

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

* * * * *

* CA NO. 15-419-WES

MARKHAM CONCEPTS, INC.,
SUSAN GARRETSON, and
LORRAINE MARKHAM,
individually and in her
capacity as Trustee of
the Bill and Lorraine
Markham Exemption Trust
and the Lorraine Markham
Family Trust

VS.

* MARCH 5, 2018

HASBRO, INC., REUBEN
KLAMER, THOMAS FEIMAN,
ROBERT MILLER, MAX
CANDIOTTY, DAWN
LINKLETTER GRIFFIN,
SHARON LINKLETTER,
MICHAEL LINKLETTER, LAURA
LINKLETTER RICH, and
DENNIS LINKLETTER

* PROVIDENCE, RI

* * * * *

BEFORE THE HONORABLE WILLIAM E. SMITH

CHIEF JUDGE

(BENCH TRIAL - VOLUME III)

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1 5 MARCH 2018 -- 9:30 A.M.

2 THE COURT: Good morning, everyone. Welcome
3 back. We're here for the continuation of the bench
4 trial in the matter of Markham Concepts v. Hasbro,
5 Inc., et al, and I think we should start by having all
6 of you identify yourselves for the record and the court
7 reporter, so let's begin with the Plaintiffs.

8 MR. POLLARO: Robert Pollaro, representing the
9 Plaintiffs, the Markham parties.

10 MR. MOEHRINGER: John Moehringer, Cadwalader,
11 Wickersham & Taft, also representing Plaintiffs.

12 MR. COLE: David Ashley Cole, Cadwalader,
13 Wickersham & Taft, also representing Plaintiffs, the
14 Markham parties.

15 MS. DUNN: Mary Dunn, local counsel, Markham
16 parties.

17 THE COURT: Thank you.

18 MR. KRUMHOLZ: Good morning, your Honor.
19 Josh Krumholz, Hasbro.

20 MS. BATLINER: Good morning, your Honor.
21 Courtney Batliner on behalf of Hasbro.

22 MR. GORACKE: Good morning. Mark Goracke on
23 behalf of Hasbro.

24 MS. VAN LOON: Good morning, your Honor.
25 Erica Van Loon on behalf of Ruben Klammer.

1 MR. RENNER: Eric Renner on behalf of Ruben
2 Klamer.

3 MS. BUSH: Christine Bush on behalf of
4 Linkletter Defendants and Rich Defendants.

5 MR. JINKINS: David Jenkins, on behalf of the
6 Linkletter Defendants and the Rich Defendants.

7 MR. TURNER: Robert Turner on behalf of Hasbro,
8 your Honor.

9 MS. FRAMROZE: Camille Framroze on behalf of
10 Hasbro.

11 MS. GARRITY: Mackenzie Garrity on behalf of
12 Hasbro.

13 THE COURT: All right. Thank you.

14 So I think we have a few preliminary things to
15 do before we take testimony, and I imagine you all have
16 some things you want to cover as well, so I'm not sure
17 who wants to take the lead here, but why don't you -- I
18 have some questions for you with respect to your
19 respective motions *in limine* on the experts. So
20 besides the two experts, what else do you expect to
21 present in the testimony?

22 MR. POLLARO: Your Honor, we had a motion that
23 we brought in to strike a belated errata.

24 THE COURT: Say it again.

25 MR. POLLARO: We filed a motion on Friday to

1 strike an errata on one of the depositions.

2 THE COURT: I do have that. I haven't had a
3 chance to review that, but we can take that up.

4 What else in terms of testimony? That's one
5 thing I'm --

6 MR. MOEHRINGER: Linda Mack Ross will be
7 testifying today, too.

8 THE COURT: All right. Anything else?

9 MR. KRUMHOLZ: From our side, your Honor, we
10 don't have any other witnesses. There will be a little
11 deposition testimony that we'll designate, unless your
12 Honor wants us to read it in.

13 With regard to Ms. Ross, just so the Court is
14 aware, Ms. Batliner will be taking that witness and it
15 will be her first cross-examination to the extent that
16 becomes necessary today. But we also just want to flag
17 because we had this concern with whether she has any
18 admissible testimony based on the deposition. We still
19 believe that's not the case, so we will be addressing
20 that during the course of her attempted testimony.

21 THE COURT: So refresh my recollection on how
22 this proceeded. I think I allowed you to take a
23 deposition of her; correct?

24 MR. KRUMHOLZ: That's correct.

25 THE COURT: And you did that, and obviously I

1 haven't seen that deposition, but you haven't filed any
2 motions based on that deposition.

3 MR. KRUMHOLZ: No. The time was short and she's
4 got a -- it obviously depends what they are offering
5 her for. To the extent they're going to try to offer
6 her for the issues related to who physically created
7 the game, the various components of the game and
8 work-for-hire issues, it does not appear she has any
9 firsthand knowledge that's admissible. She has a
10 little bit of information, having seen the prototype,
11 and we'll actually likely be asking her questions
12 regarding the commercial version versus the prototype,
13 and we think she has observations relative to the
14 derivative works issue, but we don't think she has any
15 information relative to the work-for-hire or
16 authorship.

17 THE COURT: All right. That's helpful. So it
18 sounds like the only testimony then is Ms. Ross,
19 subject to this discussion about what she may testify
20 to, and then the two experts plus any deposition
21 designations you are going to submit. Is that about
22 right?

23 MR. KRUMHOLZ: Yes, your Honor.

24 MR. POLLARO: Yes.

25 THE COURT: All right. So what order? I take

1 it the Plaintiffs would be presenting Ms. Ross first or
2 your expert first?

3 MR. POLLARO: Ms. Ross first.

4 THE COURT: Okay. So before we get to that, I
5 do want to take up the issue of the experts. I've
6 reviewed all the briefing in your motions *in limine*,
7 and I think it makes sense to have a discussion about
8 both experts and to try to give you some guidance with
9 respect to what I think permissible areas of expert
10 testimony would be and what some impermissible areas
11 are, but I think in order to do that most effectively I
12 need to understand what it is that each of you thinks
13 your expert is going to offer in terms of opinions that
14 would be helpful to the issues that I have to
15 determine; so I think I'm going to ask Plaintiffs to
16 respond first with respect to Mr. Carty.

17 MR. POLLARO: Yes, your Honor.

18 THE COURT: Why don't you come up to the
19 lectern. By the way, before we get into that, you
20 mailed to me a binder of the exhibits that you compiled
21 at my request after the trial in Los Angeles and then
22 another one was given this morning. These are the same
23 binders; right?

24 MR. KRUMHOLZ: They should be, your Honor. We
25 were asked to provide three more copies and that's what

1 we did.

2 THE COURT: Good. All right.

3 Mr. Pollaro.

4 MR. POLLARO: Thank you, your Honor. So I think
5 our expected testimony from Mr. Carty is not going to
6 be very long, so we think based on his experience he
7 can assist the Court with talking about the timeline,
8 and he's had significant experience with prototypes
9 submissions, game submissions, that type of thing, and
10 we anticipate asking questions about the timing of the
11 prototype and how long prototypes take and the
12 commercialization process in general.

13 THE COURT: So the relevant period of time here
14 is 1959; right?

15 MR. POLLARO: Yes.

16 THE COURT: So as I understand then the motion
17 *in limine*, Mr. Carty began his work life in the 1980s.

18 MR. POLLARO: I think that's for both experts.
19 I think both of them came into the industry late and so
20 obtained their experience through different means.
21 Obviously neither one of them was practicing in 1959
22 and, quite frankly, we looked for people with that in
23 that time frame and were not able find any, so --.

24 THE COURT: All right. So I guess what struck
25 me overall about all of the back and forth over the

1 experts is that it might be useful for me to hear
2 testimony, maybe, about what the industry practices
3 were in 1959 to the extent that those practices could
4 inform me about the context in which the agreements
5 were made that are relevant to this case. That might
6 be useful testimony. But what would not be useful, and
7 I don't think would be permissible, is any testimony
8 from either expert who opines upon the credibility of
9 any witnesses, who is telling the truth, who is not
10 tell the truth, or who invented the game or didn't
11 invent the game. I mean the facts, I have to make that
12 determination from the facts that are submitted in the
13 course of the trial, and I don't think any expert from
14 either side should be expressing opinions with respect
15 to whether Markham invented the game or Klamer invented
16 the game or whether the contribution of Mr. Israel and
17 Ms. Falco was characterizing that. So that's kind of
18 how I am assessing it.

19 So how do you fit Mr. Carty into that general
20 set of parameters I just outlined?

21 MR. POLLARO: That's an excellent observation,
22 your Honor, but what we've tried to do is use the
23 experience that he has and obviously all the contacts
24 and all the conversations he's had in the industry and
25 kind of extrapolate back; I mean basically how the

1 industry handles certain issues and deals with certain
2 issues and views certain issues, and obviously, you
3 know, using his experience to inform you of how it was
4 and how it currently is in his experience. So that's
5 exactly how we tried to do it.

6 We tried to stay away from anything that was
7 obviously legal in nature, but we're trying to use his
8 experience, and knowing that expert witnesses from 1959
9 are not available, you know, this is the available pool
10 of people that we had.

11 THE COURT: All right. Let me have you all
12 respond.

13 MR. KRUMHOLZ: Your Honor, we're in a hundred
14 percent agreement with what you would like to see and
15 that's what we have attempted to do with regard to
16 Mr. Orbanes. I'll deal with both of them, I think,
17 because I think the contrast is useful. It's true that
18 Mr. Orbanes was not in the industry in 1959. He was,
19 however, fully in the industry by 1965 and is one of
20 the foremost game historians, probably the foremost
21 game historian in the country, and he was trained at
22 the feet of people in 1965 that had been in the
23 industry for many years, that taught him the ropes,
24 that taught him the practices that had existed for some
25 time prior to that. So it's not a perfect match

1 because there is no perfect match.

2 The reason we settled on Mr. Orbanes, and
3 notwithstanding what we knew would be the claims of
4 bias, is because he is the single most qualified person
5 in the country, in our view, to be able to talk about
6 industry custom and practice at that time and in that
7 time frame, and what we anticipate that he'll be able
8 to do is we're going to ask him to assume some facts
9 and then to talk about industry custom and practice
10 with regard to the questions that you need to answer on
11 the instance and expense test. So he'll be in a
12 position to be able to say, well, somebody in
13 Mr. Klamer's position under these facts typically did
14 assume the economic risk, typically did attain control,
15 and he'll explain why that's the case, as opposed to
16 somebody that was in Mr. Markham's position. The idea
17 being that if a certain set of facts is more typical or
18 more consistent in the industry, that would tend to
19 make those facts more reliable and more likely to be
20 true.

21 If a certain set of facts is aberrational or
22 contrary to economic motivations, or just inconsistent
23 with the practices, that would make those facts tend
24 less likely to be true, and it's just one piece of
25 information for the Court to have in making factual

1 findings. So that is what we intend to have
2 Mr. Orbanes talk about. That will not be very long
3 testimony with regard to that.

4 With regard to Mr. Carty, the problems are
5 two-fold. He started in 1985. When I asked him at his
6 deposition, you know, what is your knowledge base for
7 1959, he actually pointed to Mr. Orbanes and to one
8 other person. He actually has no knowledge. I don't
9 doubt that he has a level of expertise for what he
10 does, but he has no knowledge about any practices back
11 at that time, so, the first problem.

12 The second problem is their report is not
13 directed toward that question. Their reports plural
14 are directed toward credibility assessment, assessing
15 the witnesses, opining on facts. I don't see anything
16 in their reports that constitute a disclosure of
17 industry custom and practice along the lines that I
18 just talked about, so if they're going to try to get up
19 and do that now I'm going to object on a disclosure
20 basis.

21 THE COURT: All right.

22 Mr. Pollaro, can respond to that. Is that
23 opinion disclosed, the opinion with respect to industry
24 custom and practice in the 1959 time frame?

25 MR. POLLARO: It's wrapped up in the opinions

1 that were disclosed, absolutely, your Honor, and some
2 of that has to deal with some of the agreements and how
3 in his practice and his experience were interpreted and
4 how they were handled in the industry. And yes, so as
5 far as we're concerned they are included in our
6 disclosure documents. And we've submitted three
7 reports because, as your Honor knows, the trial
8 transcripts came a little late, so we had our first
9 round of expert reports before the trial transcripts,
10 and then we filed a supplemental based on those trial
11 transcripts and then obviously the rebuttals.

12 THE COURT: Do you have copies of the reports of
13 all of your experts that I can have? I know you
14 submitted them as attachments. I didn't print them
15 out. I could print them out, but I'm wondering if you
16 have copies available; I would take them and have them
17 through the examination.

18 MR. POLLARO: I'm sure we do. If we don't,
19 we'll get them in short order.

20 MR. KRUMHOLZ: We have them right here.

21 MR. POLLARO: Do you have them all, Josh?

22 MR. KRUMHOLZ: Yes. I'll just bring them up.
23 How many copies would you like, your Honor?

24 THE COURT: Just one is fine.

25 MR. KRUMHOLZ: These are Mr. Carty's and

1 Mr. Orbanes'.

2 THE COURT: All right. Well, I'm going to leave
3 this pretty much where I started it, which is I've
4 given you some guidance as to what I think is what are
5 permissible areas of opinion testimony and what would
6 not be permitted and ultimately admitting -- the
7 testimony will be subject to objections, if there are
8 objections to whether this was properly disclosed, and
9 I'll deal with that as we go.

10 I may hear the testimony and take those
11 objections under advisement just so that we don't slow
12 down the process too much, given the fact this is a
13 bench trial, and I might allow testimony to occur
14 subject to my ruling later about its ultimate
15 admissibility as well, if it's admitted, about the
16 weight that I'll give it, okay? So that where we're
17 going to leave it.

18 All right. So let's move forward with your --

19 MR. KRUMHOLZ: Your Honor, on the derivative
20 works, is it useful to just flag what I think the
21 issues are there for you?

22 THE COURT: Yes.

23 MR. KRUMHOLZ: Should I --

24 THE COURT: Yes, go ahead.

25 MR. KRUMHOLZ: The issues with regard to

1 derivatives works is not a qualification issue; it's a
2 methodology issue, basically two broad problems. One
3 is to do a derivatives works analysis one needs to do a
4 comparison of the copyrightable expressions between the
5 works, to the extent that the later work has some
6 original copyrightable expression in it; and also to
7 the extent that there's new additional copyrightable
8 expression, those two factors would make the work a
9 derivative work. If there was no original
10 copyrightable expression in the second from the first,
11 then it's an independent work, and if it's just all the
12 original work and nothing more, then it's the same
13 work. That's the spectrum.

14 THE COURT: Uh'huh.

15 MR. KRUMHOLZ: The problems with what Mr. Carty
16 has done is, one, he does not compare copyrightable
17 expressions. He compares ideas or concepts, and he
18 says these concepts carry through. The second problem
19 is that he does not do a comparison of differences; he
20 just does a comparison of similarities. He was
21 answering actually really a different question.

22 In this business you sometimes have disputes
23 with inventors and you sometimes have questions about
24 whether some later work you still need to pay royalties
25 on that, and that becomes a question of whether the

1 original concepts carry all the way through. That's
2 the kinds of disputes he's apparently been involved
3 with. Hasbro certainly has been involved with those
4 kinds of disputes. That's the question he answered,
5 but that's not the question before the Court.

6 So again, we'll deal with it when the questions
7 come up, but I just want to make sure the Court is
8 aware when we're objecting that those are going to be
9 our concerns.

10 THE COURT: Right. I did get that out of your
11 filings, and I'm a little reluctant to rule now on
12 everything, but I do, I appreciate that and I
13 understand your concern.

14 MR. KRUMHOLZ: Thank you.

15 THE COURT: Yes.

16 All right. Mr. Pollaro.

17 MR. POLLARO: Yes, your Honor.

18 THE COURT: Call your witness.

19 MR. POLLARO: John Moehringer will be handling
20 Ms. Mack Ross.

21 MR. MOEHRINGER: Good morning, your Honor. We
22 call Linda Mack Ross, as our fourth witness, today.

23 LINDA MACK ROSS, PLAINTIFF'S WITNESS, SWORN

24 THE CLERK: Please state your name for the
25 record and spell your last name.

1 THE WITNESS: Linda Mack, M-a-c-k, R-o-s-s,
2 separate.

3 THE COURT: Good morning, Ms. Mack.
4 And you may inquire, Mr. Moehringer.

5 MR. MOEHRINGER: Good morning. Thank you, your
6 Honor.

7 DIRECT EXAMINATION BY MR. MOEHRINGER:

8 Q. Good morning, and I heard you just stated your
9 name for the record. Can you also state what your
10 birth name was for the record.

11 A. Linda Makiesky.

12 Q. How do you spell your last name?

13 A. M-a-k-i-e-s-k-y.

14 Q. If you don't mind me asking, how old are you?

15 A. 75.

16 Q. Are you taking any medication that might impair
17 your memory or your ability to truthfully testify here
18 today?

19 A. No.

20 Q. Do you have any condition that would inhibit your
21 memory or your ability to truthfully testify here
22 today?

23 A. No.

24 Q. What year did you graduate high school?

25 A. 1960.

1 Q. Where did you live at the time you were in high
2 school?

3 A. Minneapolis.

4 Q. I'm going to ask you a couple of questions about
5 your college. What did you study when you went to
6 college?

7 A. My undergraduate degree is in sociology, child
8 psychology. My master's is in organizational
9 development and training. And then I have additional
10 training in mediation.

11 Q. And where did you go to get your bachelor's
12 degree?

13 A. University of Minnesota.

14 Q. Master's degree?

15 A. University of Minnesota.

16 Q. What is your current line of employment?

17 A. I'm a mediator.

18 Q. And what types of things do you mediate?

19 A. I mediate employee-management disputes for federal
20 agency.

21 Q. And do you understand this case involves Bill
22 Markham?

23 A. Yes.

24 Q. Were you related to Bill Markham?

25 A. He was my uncle.

1 Q. How exactly were you related to him?

2 A. He was married to my dad's sister.

3 THE COURT: Ma'am, would you just maybe move
4 that microphone.

5 THE WITNESS: Okay. Is that better?

6 THE COURT: That's better.

7 Q. And what was your aunt's name?

8 A. Sue, or Sue Makiesky at one time.

9 Q. And she married Bill Markham and became Sue
10 Markham; is that correct?

11 A. Yes.

12 Q. When did you first meet Bill and Sue Markham?

13 A. 1956. Well, I heard about them for years and
14 years, but they came for my uncle's funeral in 1956.

15 Q. And where did you meet them?

16 A. At my, well, at my home at the funeral. The after
17 funeral things were at my home, so I met them during
18 the funeral and at my home.

19 Q. And that was in Minneapolis?

20 A. Yes.

21 Q. After you met them did you become close to Bill
22 and Sue Markham?

23 A. Yes, I saw them more often.

24 Q. Did you visit Minneapolis periodically?

25 A. They came for events, and Bill was also doing work

1 with Lakeside Plastics, which was getting into the game
2 business, and so he would come and be with Lakeside
3 Plastics as well.

4 Q. And what is Lakeside Plastics?

5 A. Well, it was a sign maker at the time, but then it
6 became Jax, J-a-x, eventually. And now it was just
7 sold to another game company; I don't know the name.

8 Q. And was there anyone in particular your uncle
9 would come see in Minneapolis?

10 A. Zom Levine, who was the owner of Lakeside
11 Plastics. But they also traveled to Hong Kong and did
12 a lot of things together in Minneapolis, not in
13 Minneapolis.

14 Q. Why would they travel to Hong Kong?

15 A. Looking up molds or looking up products. I don't
16 know, you know, they went fairly often, so I'm not
17 exactly sure everything they did there.

18 Q. Where did your aunt Sue and uncle Bill live?

19 A. At that time in Hollywood Hills.

20 Q. In California?

21 A. Yes.

22 Q. At some point did you live with them for a month
23 while you spent a summer in California?

24 A. Yes.

25 Q. What year was that?

1 A. 1962.

2 Q. And did you spend more time with them in
3 California as they grew older?

4 A. Yes, a lot more time.

5 Q. And why was that?

6 A. Well, as they got older and they had needs, I just
7 went there to help out. My aunt wasn't so well so I
8 would go back and forth.

9 Q. In your own words can you please tell the Court
10 today a little bit about the type of person your uncle
11 Bill was.

12 A. He was creative. He was fun. He was caring. He
13 was very generous, very trusting, so a little naïve.
14 He just had a lot of life to him. And he saw -- one of
15 those who saw the glass, well, my aunt saw it half
16 empty, he saw it half full.

17 Q. You said he was creative.

18 A. Yes.

19 Q. Can you explain what you mean by him being a
20 creative person.

21 A. Well, he just always thought about different
22 ideas, and actually I think in the 70s we met with my
23 friend who was a nursery school teacher so he could
24 pick her brain and think about things that preschoolers
25 might like. So he was always thinking about things

1 like that.

2 Q. Did you consider your uncle Bill a good
3 businessman?

4 A. No.

5 Q. He wasn't business savvy?

6 A. No.

7 MS. BATLINER: Objection.

8 THE COURT: Overruled.

9 Q. Do you recall the first time your uncle Bill
10 brought The Game of Life to you in Minnesota?

11 A. I don't. It was either '59 or '60.

12 Q. But you did recall that he brought the game; you
13 just don't know exactly what year it was?

14 A. No. I was, like, 17.

15 Q. So he brought the game to Minnesota in either 1959
16 or 1960?

17 A. Yes.

18 Q. Did you play The Game of Life with your uncle Bill
19 at that time?

20 A. Yes.

21 Q. What do you recall about the first time you played
22 The Game of Life with your uncle Bill?

23 A. Well, the spinner and the three-dimensional aspect
24 to it, and just that he was asking me for, you know,
25 did I have any thoughts about it or how to play it or

1 anything that should be added. But again, I was 17 so
2 I wasn't exactly worldly.

3 Q. Was it your understanding that the reason he
4 brought it to you was to have you play the game and
5 give him feedback about the game?

6 A. Yes, as a teenager.

7 Q. Do you recall specifically where in Minneapolis
8 you were when you played The Game of Life?

9 A. I don't remember. It was the hotel he was staying
10 at at that time.

11 Q. Was your aunt Sue present at the hotel room --

12 A. No.

13 Q. -- when you played the game?

14 A. No.

15 Q. Was anyone else present when you played the game
16 with your uncle Bill?

17 A. No.

18 Q. So it was just the two of you?

19 A. Yes.

20 Q. Do you recall approximately how long you were
21 playing The Game of Life that day?

22 A. I don't. It wasn't a very long time. It was just
23 enough time to see it and give him some feedback, and
24 that was it.

25 Q. How would you describe the game board that you

1 played the first time with your uncle Bill?

2 A. It was just a three dimensional, and I'm not sure
3 what else you want me to say here or what I should be
4 saying here. It was a three-dimensional game board.
5 It was different than, you know -- I was a game player,
6 so it was different than Monopoly or another kind of
7 game because of the three-dimensional aspect.

8 Q. Do you remember what aspects of the game were
9 three dimensional?

10 A. I don't know if it was the mountain or a bridge,
11 you know, it's hard to -- it was just in general I saw
12 that.

13 Q. Do you recall, was there a path on the game board
14 that you played with your uncle Bill?

15 A. I think there was a path on it like a bridge, but
16 I can't exactly tell you that. This is --.

17 Q. When you referred to a bridge, did the track that
18 was on the game board include a three-dimensional
19 overpass?

20 A. Yes; it was a three-dimensional game. I mean
21 everything to me was three dimensional; it just was so
22 different.

23 Q. And you mentioned the spinner. Can you describe
24 the spinner that was on the game board.

25 A. It was kind of a little noisy, had different

1 colors on it.

2 Q. And did it have numbers on it?

3 A. Yes

4 Q. Do you recall whether the three-dimensional game
5 board that your uncle carried in that day to the hotel
6 room was foldable?

7 A. I don't.

8 Q. Do you remember if the path on the game board had
9 writing on it?

10 A. I don't.

11 Q. Did it include anything about life elements on the
12 game board that you played?

13 A. Life elements being what you do in life, yeah,
14 because I had to comment on, you know, that I think
15 something else was or should be added.

16 Q. So he asked you for comments regarding the life
17 elements of the game board?

18 A. Right. Yes.

19 Q. Do you recall any particular comments you might
20 have given?

21 A. No. When I read the stuff after I thought about
22 the -- when I read the car that was being expanded,
23 because at that time I sort of dreamed I was going to
24 have 12 kids and I remember the car was like four and I
25 thought oh, this is too little, so I think he expanded.

1 But when I read that they had expanded the car, that's
2 when I thought that was probably something I might have
3 said to him.

4 Q. Do you remember how many folks the car you played
5 with held?

6 A. It was four, four spaces.

7 Q. Four spaces in the car?

8 A. Yeah, which would only give two kids, so.

9 Q. Were you asked to provide feedback regarding
10 anything else with respect to The Game of Life?

11 A. No. Just what I thought about it, how you played
12 it, that kind of thing.

13 Q. Did you discuss the rules of the game with your
14 uncle that day?

15 A. I know he asked me about those. I can't tell you
16 specifically what I know what they were, but I mean he
17 asked about, when we played it, if I thought that it
18 played easily or whatever.

19 Q. Did he explain how to play the game to you that
20 day?

21 A. Yeah.

22 Q. And did he ask you feedback about how the game
23 would be played?

24 A. Yes.

25 Q. At the time you played The Game of Life with your

1 uncle, was it your understanding that it was not still
2 yet commercially available?

3 A. I don't think I had an -- I mean it's hard for me
4 to look back at 17 and say did I know it was ready. I
5 just knew that Milton Bradley had got it and it was
6 going, so I don't what -- you know, he was testing it
7 with me, so I don't know that I thought about it at
8 that time.

9 Q. Were you asked to sign any kind of confidentiality
10 agreement?

11 A. No.

12 Q. Were you instructed not to discuss The Game of
13 Life with anybody else after you played it with your
14 uncle?

15 A. No. I was really excited that Milton Bradley had
16 bought it, so I guess my friends all knew that my uncle
17 had created this game that Milton Bradley was putting
18 out.

19 Q. That Milton Bradley was going to be putting it out
20 in the future?

21 A. Right, right. Yes.

22 Q. How did you learn that Milton Bradley had bought
23 the game?

24 A. I don't know. I mean my mother could have told
25 me. I just don't know which of my relatives would have

1 told me, but someone told me that they had, but I don't
2 know if it was my mother, my uncle, or another uncle.

3 Q. At some point I think you mentioned you had spent
4 a summer in California; correct?

5 A. Uh'huh.

6 Q. That was 1962?

7 A. Uh'huh. Yes.

8 Q. Did you spend some part of that summer living with
9 your aunt Sue and uncle Bill?

10 A. Yes.

11 Q. How long did you live with them during that
12 summer?

13 A. Maybe four to six weeks.

14 Q. During that time did you visit their office?

15 A. Yes.

16 Q. Do you recognize -- do you remember anything about
17 the visit to the office?

18 A. No, not really. I mean my uncle was in Hong Kong
19 when I first came, so my aunt had to stop in the office
20 and pick up things or do whatever; and I walked in, and
21 they'd talked about their employees, so I met them,
22 Grace and Leonard. But no, looking back, I think I
23 went to the office with him one time, but it wasn't for
24 any length of time.

25 Q. You mentioned the name Leonard. Was that Leonard

1 Israel?

2 A. Yes.

3 Q. Who was Leonard Israel?

4 A. An employee of my uncle's.

5 Q. You met Leonard Israel when you went to visit in
6 the office?

7 A. Yes. And my aunt and uncle talked about them a
8 lot as well, so I did meet them.

9 Q. What did they talk about?

10 A. Just that they were their employees, they liked
11 them a lot.

12 Q. Do you know anything about their work as employees
13 of your aunt and uncle?

14 A. No.

15 Q. What do you remember about meeting Leonard Israel?

16 A. I just remember -- I mean I don't remember that
17 much, saying hello and, you know, meeting him. I don't
18 have -- I just know I was at the office and met them.
19 I can't tell you too much about that at that time.

20 Q. Okay. And I think you mentioned the name Grace
21 also. Were you referring to Grace Falco Chambers?

22 A. I guess that's her last name. I don't think I
23 ever knew it.

24 Q. Do you know who she was?

25 A. An employee of my uncle's.

1 Q. And did you ever meet Grace?

2 A. Yes.

3 Q. What do you remember about meeting Grace?

4 A. Again, just saying hello to them. I don't
5 remember much else.

6 Q. Do you know anything about the work that Grace did
7 as an employee of your aunt and uncle?

8 A. Yes.

9 Q. Are you familiar with the name Ruben Klamer?

10 A. Yes.

11 Q. Who is Ruben Klamer?

12 A. Well, I thought he was my uncle's friend who was a
13 dealmaker, kind of marketing dealmaker kind of person.

14 Q. And where did you get that understanding from?

15 A. I just always heard his name, but I knew he was
16 going to put the deal together.

17 Q. What deal are you referring to?

18 A. The Game of Life.

19 MS. BATLINER: Objection. Foundation. She just
20 said that she doesn't know what work he was doing.

21 THE COURT: I'll sustain the objection. You can
22 ask some more foundational questions about what she is
23 talking about in terms of this deal.

24 Q. I believe you mentioned that you thought your
25 understanding was that Ruben Klamer was a marketing guy

1 and deal guy; correct?

2 A. Right.

3 Q. And that --

4 MS. BATLINER: Objection. We still don't know
5 how she knew what she knew, what she thinks she knew
6 about Klamer.

7 THE COURT: I think he is getting to that, so
8 let's see where it goes.

9 MR. MOEHRINGER: Thank you, your Honor.

10 Q. Let me back up for a second so we make sure we ask
11 the right questions. We're talking about Ruben Klamer
12 and your understanding of who Ruben Klamer was.

13 A. Right. I mean my uncle spoke about him often.

14 Q. Okay. So over the years you heard about Ruben
15 Klamer?

16 A. Yes.

17 Q. And what was your understanding who Reuben Klamer
18 was, again?

19 A. That he was the one putting together the deal for
20 the game.

21 Q. And when you say "putting together the deal for
22 the game," you mean the deal for The Game of Life?

23 A. Yes.

24 Q. How did you come to understand that there was a
25 deal with respect to The Game of Life?

1 MS. BATLINER: Objection, your Honor.
2 Foundation.

3 THE COURT: Well, that is a foundational
4 question, the "how" question, so overruled.

5 You may answer that.

6 A. Just that when my uncle talked about the game and
7 how it came to be, he just said how it got sold to
8 Milton Bradley, that Ruben Klammer was the one who made
9 that deal with Milton Bradley.

10 Q. And I think earlier you testified that you did
11 have an understanding that the game was sold to Milton
12 Bradley; correct?

13 A. Yes.

14 Q. And that you had heard that -- I don't want to put
15 words in your mouth -- that you had heard that both
16 from your mother and your uncle?

17 A. I don't know who told me. It could have been my
18 mother. It could have been my uncle. It could have
19 been another cousin. I mean we all knew about it and
20 my whole family knew that that was happening. It was a
21 very big deal for my uncle to have something with
22 Milton Bradley.

23 Q. And it was your understanding that Ruben Klammer
24 was involved in helping put that deal together; is that
25 correct?

1 A. Yes.

2 Q. Did you have any understanding of what Reuben
3 Klamer might have been involved with with respect to
4 The Game of Life?

5 MS. BATLINER: Objection. Hearsay. She said
6 what she knows of what Reuben Klamer did was from her
7 family.

8 THE COURT: Right. Well, we are deep into
9 hearsay here.

10 If I'm understanding her testimony, it's only
11 things that she's heard from either Sue or Bill
12 Markham; correct? How is this admissible?

13 MR. MOEHRINGER: I think we're just getting to
14 the point as to what her understanding of what Reuben
15 Klamer's role was, and she heard it from numerous
16 things and what she experienced over the years as far
17 as the deal went. It's not actually that someone told
18 her that Reuben Klamer was this person; it was just her
19 understanding of what that deal was and what his role
20 was.

21 THE COURT: Well, okay. If you're asking -- do
22 you go by Ms. Mack or Ms. Ross?

23 THE WITNESS: You can call me Linda, that's
24 fine.

25 THE COURT: Well, we usually use last names.

1 THE WITNESS: Ms. Ross, I guess.

2 THE COURT: Okay. Ms. Ross.

3 If you're asking Ms. Ross the question about the
4 specific roles of each of these people in this matter,
5 then the only place she could have learned that is from
6 what Bill and Sue Markham told her; right? That's what
7 her testimony is, I think.

8 MR. MOEHRINGER: Or the experience of her family
9 with this big event that occurred within her family.

10 THE COURT: All right. So I'll let you ask more
11 foundational questions about that big event or whatever
12 it is you're referring to, but what I'm getting at is
13 ultimately it sounds like most of her knowledge, if not
14 all of her knowledge, comes from what other people told
15 her; and what I'm asking you is how is that admissible
16 and not hearsay, not inadmissible hearsay? What's the
17 rationale why that should be admitted?

18 MR. MOEHRINGER: The primary rationale, again,
19 we're really only asking whether or not she knew Reuben
20 Klammer and what she knew about him. She testified she
21 knew he was a marketing person. That's her lay
22 assessment of the facts. We're not asking whether or
23 not, you know, Bill Markham told her that, Sue Markham
24 told her that in any given moment. It is her lay
25 opinion from her experience at that time and assessment

1 at that time that her understanding of what he was was
2 the marketing guy. That's all she knows about him.
3 She doesn't know anything else about what he did or
4 what he didn't do, and we're not offering it for that.
5 We're just bringing up whether or not she does or
6 doesn't know who Reuben Klamer was.

7 THE COURT: Well, I'll let you ask a few more
8 questions, --

9 MR. MOEHRINGER: Okay.

10 THE COURT: -- see what we have.

11 Q. Did you personally meet Reuben Klamer?

12 A. No. I don't recall meeting him.

13 Q. Did you know anything else about what Reuben
14 Klamer might have done with respect to The Game of
15 Life?

16 A. No.

17 Q. Thank you. Did you live in New York City at some
18 point?

19 A. Yes.

20 Q. When did you live in New York City?

21 A. 1965 and '66.

22 Q. And did your uncle Bill visit you while you lived
23 in New York City?

24 A. Yes.

25 Q. How many times do you recall him visiting you

1 while you lived in New York City?

2 A. Well, he was there for the toy fair that I saw him
3 both times, so twice.

4 Q. So he visited you twice?

5 A. Yes.

6 Q. And did you attend this toy fair with him twice?

7 A. I attended the toy fair with him once.

8 Q. Why did you only attend with him once?

9 A. Because I was sick when he was there one time.

10 Q. So one time you were sick and you couldn't go to
11 the toy fair with your uncle?

12 A. Yes.

13 Q. What did your uncle do when he visited you the
14 time when you were sick?

15 A. He just brought me dinner and visited with me.

16 Q. Do you recall the other time when you attended the
17 toy fair with your uncle?

18 A. Yes.

19 Q. Do you remember which year that was?

20 A. No. I think it was '66.

21 Q. So it either could have been 1965 or 1966?

22 A. Yes. I believe it was '66.

23 Q. What was your experience attending the toy fair
24 with your uncle Bill?

25 A. It was a fun experience for me walking around and

1 seeing games and meeting different people that were in
2 the industry. Made me feel kind of important.

3 Q. Why did you feel important?

4 A. I don't know; just I was my uncle's niece, and he
5 was recognized and, you know, just he included me in
6 that, kind of, so.

7 Q. What do you mean he was recognized?

8 A. Well, people would introduce him or know who he
9 was, that he was the creator of The Game of Life, and
10 that's how people talked about it when we were there.

11 MS. BATLINER: Objection, your Honor, to the
12 extent they're offering her for the truth of the matter
13 asserted.

14 THE COURT: Well, I think it's being offered
15 just for purposes of fact that it happened, not the
16 truth of the assertion, so I'll overrule the objection.

17 MR. MOEHRINGER: Thank you, your Honor.

18 Q. I'm sorry; did you have anything else in response
19 to that particular question about your experience?

20 A. No. I mean just that it was seemed to be known,
21 and he was known. And I got to meet some interesting
22 people, and I even got a game out of it, so.

23 Q. Do you recall who you met?

24 A. No. I mean just, I couldn't.

25 Q. Do you recall what game you got?

1 A. Yeah. Perquackey. Lakeside had just acquired it.
2 I had played it earlier, but it was off the market and
3 Lakeside Plastics had acquired it and it was there.

4 Q. Okay. Did you attend with anybody else while you
5 were at the toy fair, or was it just with your uncle?

6 A. Just my uncle.

7 Q. How was your uncle Bill treated as you moved
8 around the toy fair?

9 A. People were friendly to him.

10 Q. Thank you. Was it your understanding that Bill
11 Markham received royalties on the sales of The Game of
12 Life?

13 A. Yes.

14 Q. Did you understand The Game of Life to be Bill
15 Markham's primary source of income?

16 A. Yes.

17 Q. Do you have any financial interest in The Game of
18 Life?

19 A. No.

20 Q. Did you ever receive any income in connection with
21 The Game of Life?

22 A. No.

23 Q. Did you receive any inheritance when Bill Markham
24 died?

25 A. No.

1 Q. Do you have any current relationship with Lorraine
2 Markham?

3 A. No.

4 Q. Do you know who Lorraine Markham is?

5 A. Yes.

6 Q. Who is she?

7 A. She was married to Bill for a short time.

8 Q. When was the last time you saw Lorraine Markham?

9 A. At Bill's funeral.

10 Q. When was that?

11 A. 1992, I think.

12 Q. Have you communicated with Lorraine Markham at all
13 since your uncle's funeral?

14 A. No. I don't even think I talked to her at his
15 funeral.

16 Q. When was the last time you saw your uncle Bill
17 alive?

18 A. In 19 -- oh, at his wedding reception, so I don't
19 know if that was '91 or if it was '90, but it was right
20 at his wedding reception.

21 Q. When he married Lorraine Markham?

22 A. Uh'huh.

23 Q. How did you become aware of this litigation?

24 A. I was sent an article from a friend.

25 Q. Why do you believe you were sent an article from a

1 friend?

2 A. Because people knew my uncle invented The Game of
3 Life and they thought I would be interested in knowing
4 that. I received -- a couple of people sent me an
5 article.

6 Q. And what did you do after you received the
7 article?

8 A. The last article I received, I talked to a couple
9 of my cousins and one of my friends who lived in LA
10 about this and what I should do, and thought about
11 that, and the only name that was listed was the
12 judge's, so I wrote the judge.

13 Q. And what did you think about when you tried to
14 decide what to do?

15 A. I don't care for Lorraine Markham, so I don't want
16 her to benefit from this. And I felt like this was
17 60 years after the fact, my uncle is not here to defend
18 himself, and I know this was an important part of his
19 life, and I felt like he contributed a lot to my life,
20 he added some really nice experiences to my life, so I
21 felt I should be doing this. But I had to weigh
22 whether -- I don't -- I didn't know enough, how much
23 she might benefit from it financially, but my issue was
24 that.

25 And I really, when I wrote the letter I had no

1 idea it would be such a cumbersome process for me, I
2 mean having to come to this cold weather. So when I
3 wrote the judge I don't think I had an expectation of
4 what would happen, I wanted him to kind of know; and
5 then this ended up a cumbersome process.

6 Q. And can you tell us why you decided to come today.

7 A. Well, it was a hard one since my flight was
8 cancelled on Friday and I went through the whole
9 process, but I felt like I needed to finish this or at
10 least speak for Bill, since he can't speak for himself.

11 MR. MOEHRINGER: Thank you very much.

12 I have no further questions.

13 THE COURT: Thank you, Mr. Moehringer.

14 Okay. Ms. Batliner.

15 CROSS-EXAMINATION BY MS. BATLINER:

16 Q. Hi, Ms. Ross.

17 A. Hi.

18 Q. Thank you for coming to the cold weather.

19 A. Okay.

20 Q. Just a moment here. I have a few questions for
21 you today. First, very briefly, Bill Markham never
22 told you that he had started work on a
23 three-dimensional game before this 1959-1960 time
24 frame, did he?

25 A. I don't remember discussing it, but --

1 MR. MOEHRINGER: Beyond the scope --

2 THE COURT: Hold it. What is it?

3 MR. MOEHRINGER: Beyond the scope of the direct.

4 THE COURT: Overruled. Go ahead.

5 A. No, I don't recall. I just remember hearing about
6 The Game of Life. I don't recall anything before.

7 Q. And you recall him as an idea's man and a creative
8 man, but do you remember him ever telling you that he
9 had ideas about The Game of Life from the time he was a
10 teenager?

11 A. No.

12 Q. Okay. So switching gears. Do you recall being
13 deposed in this case last month?

14 A. Yes.

15 Q. And do you remember in your deposition my showing
16 you some images of a few different games, Game of Life
17 versions?

18 A. Uh'huh. Yes.

19 Q. So I'd like to show you one of those images again
20 and see how it compares to what you saw in that
21 Minnesota hotel room, okay?

22 MS. BATLINER: Your Honor, I have copies if
23 you'd like them in-hand, or I can just use the ELMO.

24 THE COURT: Use the ELMO.

25 Q. This is the first page of a multi-page exhibit.

1 THE COURT: Is this a full exhibit or --

2 MS. BATLINER: That is -- okay. So this is Ross
3 Exhibit 7 from her deposition, and it is images of the
4 same physical game that appears in HTX14 which was
5 admitted in November. It's not the exact same images,
6 they were just taken on a different day, but it's the
7 same game.

8 THE COURT: All right. Why don't we just do
9 this. I mean let's identify this as a separate exhibit
10 since you're going to -- are you going to be moving
11 this into evidence?

12 MS. BATLINER: No, your Honor, it's just to get
13 her observations. I mean I'd like to get on the record
14 that she recognizes it as Exhibit 7 from her
15 deposition, which we haven't done yet, but I don't
16 actually need to admit the document. But we can, if
17 you'd like.

18 THE COURT: Well, it's not what I like, it's
19 just what it is you're trying to do here and what the
20 point of it is.

21 But you're standing up, Mr. Moehring. What is
22 it?

23 MR. MOEHRINGER: I would note that I think both
24 Ross Exhibit 6 and Ross Exhibit 7 with respect what
25 Courtney might be going to, Ms. Batliner might be going

1 to, the --

2 MS. BATLINER: I'm not actually.

3 MR. MOEHRINGER: Oh, you're not? Okay. Neither
4 one of them are on the actual exhibit list, so we would
5 have to deal with that.

6 THE COURT: I'll let you proceed and see where
7 it goes. Go ahead.

8 MS. BATLINER: Thank you, your Honor.

9 Q. Ms. Ross, you see this here? It says Ross 7.

10 A. Yes.

11 Q. I'll represent to you that this is Exhibit 7 from
12 your deposition. Do you understand that to be true?

13 A. Okay.

14 Q. Okay.

15 MS. BATLINER: And like I said, I've told the
16 Court that this Ross Exhibit 7 comprises the same,
17 comprises photographs of the same physical game that is
18 represented in Hasbro trial Exhibit HTX Exhibit 14,
19 which was admitted in November.

20 And third, I'll just represent that the game
21 pictured here in Ross Exhibit 7 and also in HTX14 is a
22 1960 commercial version of the game, and I should
23 clarify that actually. It's a commercial version of
24 The Game of Life that bears a copyright date of 1960.

25 Q. Okay. So Ms. Ross, turning back to this exhibit

1 from your deposition, let me show you another page from
2 it. Do you remember seeing this image at your
3 deposition?

4 A. Yes.

5 Q. And you had seen a 1960 version of the game with
6 your attorneys the day before your deposition as well,
7 hadn't you?

8 A. Yes.

9 Q. So I'd like you to recall for a moment the
10 prototype that you saw with your uncle in Minnesota.
11 Do you have it in your mind's eye?

12 Now, as compared to the 1960 game that your
13 attorney showed you, the prototype that you saw was
14 more three dimensional; isn't that right?

15 A. Yes.

16 Q. And the prototype also was more colorful?

17 A. I don't recall how colorful. I just remember the
18 things jutting out. I don't remember that it's more
19 colorful or not more colorful.

20 Q. Okay. Could we turn to a page of your deposition.

21 MS. BATLINER: Your Honor, I have copies if
22 you'd like it in-hand, or I could just use the ELM0.

23 THE COURT: Go ahead and use the ELM0.

24 Actually, do you have a copy you could hand up
25 to me?

1 MS. BATLINER: I do, yes.

2 THE COURT: Give it to the clerk. Thanks.

3 Tell me what you're referring to.

4 MS. BATLINER: We are looking at page 93, lines
5 93-11 to 94-10 really, and you can see -- I'm sorry.

6 THE COURT: Hold on.

7 MS. BATLINER: Uh'huh.

8 THE COURT: All right. You can read her
9 deposition from page 93-11 through 22.

10 MS. BATLINER: Thank you.

11 Q. I'm going to read from your deposition here.

12 Okay. (Reading)

13 Question: When you say that what you remember
14 playing with your uncle was more three dimensional
15 than --

16 Answer: The game that came out.

17 Question: What do you mean by that?

18 Answer: Well, it just seemed like things were
19 bigger on that game and a little more colorful than
20 what we saw yesterday.

21 Question: What elements were colorful?

22 Answer: I don't know. I mean there's just
23 color to it. There wasn't so much color to it, the '60
24 game.

25 End quote.

1 Was that your testimony a few weeks ago?

2 A. That's what you have down there.

3 Q. No reason to doubt that that's what your testimony
4 was?

5 A. No.

6 Q. All right. And now, again, as compared to the
7 game that you looked at with your attorneys, on the
8 prototype things were bigger; right?

9 A. Yup. Yes.

10 Q. And as compared to that prototype, the 1960 game
11 that we're looking at here, Exhibit 7, doesn't have as
12 many 3-D figures on it; is that right?

13 A. Right.

14 Q. And the prototype that you saw had bridges and
15 overpasses on the board, but the commercial game that
16 you played did not; correct?

17 A. Right.

18 Q. Okay.

19 A. And that's what stuck out to me was the
20 three-dimensional stuff more than anything, just the
21 scope of it.

22 MS. BATLINER: I have no further questions.
23 Thank you, Ms. Ross.

24 THE COURT: Thank you, Ms. Batliner.

25 Mr. Moehringer, do you have any redirect?

1 MR. MOEHRINGER: I have nothing further, your
2 Honor. Thank you.

3 THE COURT: Ms. Ross, your testimony is
4 complete. Thank you very much for being here. You may
5 step down. That will probably be the last time you
6 write a letter to a judge; right?

7 THE WITNESS: I'll give more thought to it.

8 THE COURT: All right.

9 Your next witness, please.

10 MR. POLLARO: The Plaintiffs call Robert Carty
11 to the stand.

12 ROBERT THOMAS CARTY, JR., PLAINTIFF'S WITNESS, SWORN

13 THE CLERK: Please state your name for the
14 record and spell your last name for the record.

15 THE WITNESS: Robert Thomas Carty, Jr., last
16 name C-a-r-t-y.

17 THE CLERK: Thank you.

18 THE COURT: Good morning, Mr. Carty.

19 THE WITNESS: Good morning, your Honor.

20 THE COURT: You may inquire, Mr. Pollaro.

21 Let's go off the record for a moment.

22 (Discussion off the record)

23 DIRECT EXAMINATION BY MR. POLLARO:

24 Q. Good morning, Mr. Carty.

25 A. Good morning, Mr. Pollaro.

1 Q. Thank you for being here today. Can you please
2 state your name for the record.

3 A. Robert Thomas Carty, Jr.

4 Q. Do you understand your testimony here today is
5 under oath and subject to penalty of perjury?

6 A. Yes, I do.

7 Q. Have you ever testified in court before?

8 A. No, sir, I have not.

9 Q. How about deposition. Have you been deposed
10 before this case?

11 A. Once for less than 10 minutes.

12 Q. Have you ever been retained as a consultant or an
13 expert in the board game industry before this case?

14 A. Yes, sir.

15 Q. How many times?

16 A. Many times.

17 Q. Can you tell me in what context.

18 A. Three of them were with services that were doing
19 advice on investments and the purchase of other game
20 companies. I did -- I had a couple of conferences with
21 the Library of Congress regarding putting games into
22 libraries and schools. I did some work with the Korean
23 government on the import and potential distribution of
24 games manufactured in Korea into the U.S. I've worked
25 with a lot of other companies, people that are friends

1 and designers and authors, just in general.

2 Q. Do you have an understanding of your role in this
3 case?

4 A. My understanding of my role in this case was to
5 offer a neutral view of the game industry's standard
6 practices and procedures regarding the submissions and
7 publication.

8 Q. Do you believe that you have the skills and
9 experience to do just that?

10 A. I've been doing that in one capacity or the other
11 for the past 33 years. I believe that I have -- that I
12 do.

13 Q. Can you give us a brief description of your
14 education.

15 A. I'm a high school graduate. I have some college,
16 but at one point I could no longer could afford to go
17 to college and so I enlisted and I served in the Marine
18 Corps, hoping to have a college bonus, but after
19 Grenada all bonuses were rescinded.

20 Q. How long did you serve in the Marine Corps?

21 A. Six years.

22 Q. Can you tell us why you joined the Marine Corps.

23 A. My father was a Marine, my uncle was a Marine and
24 served in Okinawa actually, and my father's
25 great-great-uncle was a Rough Rider. We just have a

1 history of military service so I was -- I always wanted
2 to be in the Corps.

3 Q. You were in the Corps, I believe you said, until
4 1988; is that correct?

5 A. Yes.

6 Q. And from your CV it looks like you worked for a
7 couple of distributors when you left the service. Is
8 that correct?

9 A. Yes.

10 Q. Tell us the name of those distributors.

11 A. I worked for Glenwood in '85, '87, and I worked
12 for Diamond, and then Liberty.

13 Q. If we stick with the distributors for now that you
14 worked for, can you give us an overview of what your
15 job responsibilities were while working for the
16 distributors.

17 A. Very broad and varied. I did all kind of jobs
18 there, but primarily I was responsible for building the
19 systems that brought goods from the selection process,
20 the goods we would carry, and providing the conduits
21 that brought them into the consumers' and the
22 retailers' hands.

23 Q. Were these distributors in the game industry?

24 A. Yes, they were.

25 Q. So then from your CV it looks like you went to

1 work for Mayfair Games. Who was Mayfair Games?

2 A. Mayfair was a prominent publisher in the game
3 industry primarily focused on board games when I went
4 to work there. They had made notable changes in the
5 industry upping the -- raising the bar, as they used to
6 say, to improve part quality and improve the experience
7 for the consumer.

8 Q. Can you give us an overview of what your work
9 experience was while at Mayfair Games.

10 A. When I went to work at Mayfair Games and in the
11 building process, I had a lot of hats. I was the
12 director of sales and marketing and became a partner in
13 the first year when they gave me stock for sweat
14 equity, and I was the gatekeeper, which is kind of a
15 person that got to look at every submission that came
16 in and determined which ones to proceed with.

17 Q. When did you begin working for Mayfair Games?

18 A. 1997.

19 Q. You used the term "submission." What is a
20 submission?

21 A. When a person or group have a game they want their
22 publisher to publish, they make a submission, they
23 offer the game to the publisher. Different companies
24 have different procedures. We had a varied three-step
25 process.

1 Q. When you began working with Mayfair Games, what
2 business was Mayfair Games in? What kind of products
3 did they sell?

4 A. They made board games.

5 Q. How many new product submissions would you say you
6 viewed while you were at Mayfair Games?

7 A. A couple thousand.

8 Q. Can you tell us a little bit about the process
9 that you undertook in reviewing submissions while you
10 were at Mayfair Games.

11 A. We had -- the process involved the submitter to
12 provide us with basically a resume of the game and a
13 letter of intent why they believe Mayfair should be the
14 publisher. These would be reviewed, and if they passed
15 what we called the sniff test we would evaluate them
16 and then request a set of rules. If the rules then
17 passed the test, our next step would be to request a
18 prototype.

19 Q. What are you looking for when you review the rules
20 and the prototype?

21 A. Playability, making sure that the game system
22 itself wasn't broken, that it was developable, that we
23 could actually create a saleable product out of the
24 prototype and the design.

25 Q. Are you looking at specific features of the

1 submission?

2 A. We're looking at all the factors, and then the
3 goal would be whether we can actually reproduce that,
4 the look, the feel, the texture of the play in the
5 final game.

6 Q. And would you accept or reject the game after your
7 analysis?

8 A. Yes, sir, we would.

9 Q. How many of the thousands of product submissions
10 made it to the prototype stage?

11 A. A few hundred.

12 Q. So you've analyzed hundreds of prototypes in your
13 experience?

14 A. Yes, sir.

15 Q. How about specifically board game prototypes?

16 A. They were almost all board game prototypes.

17 Q. In your experience do most product or game
18 submissions already include a playable model?

19 A. Not in my experience.

20 Q. Can you give an idea roughly how many did or
21 didn't include a playable model.

22 A. In the -- immediately upon request only three or
23 four. Almost all of them we would have to wait for a
24 prototype to be delivered.

25 Q. So I want to make sure I have your testimony. So

1 if a product submission is submitted to Mayfair Games,
2 you're in charge of analyzing that submission; correct?
3 Is that what you said?

4 A. Yes, sir. That's correct.

5 Q. And when a prototype is eventually submitted -- I
6 think you said you had to wait -- what would happen in
7 that interim?

8 A. Well, we'd have communication with the designer,
9 generally just a regular e-mail back and forth,
10 sometimes a phone call, just keeping in touch to make
11 sure that we knew what was going on.

12 Q. Would these products that you were interested in,
13 as the gatekeeper, at Mayfair Games? In other words
14 were you interested in ultimately putting that product
15 on the market if it passed the sniff test and all the
16 other tests that you were looking at?

17 A. It would be products that we feel would be viable
18 that I thought we actually had a chance to sell and
19 possibly make money on.

20 Q. Can you give us examples of a board game you
21 accepted and why.

22 A. We accepted a game called Nuns On the Run. That
23 was a very clever design involving naughty nuns dodging
24 discovery, which is the illustration from the cover.

25 Q. Can you give us an example of a board game you

1 rejected and why.

2 A. One comes to mind pretty clearly and that's in the
3 late 90s we had a submission of a Bible Monopoly game
4 where they replaced the neighborhoods with different
5 chapters in the Bible and there were Bible verses and
6 rewards and penalties on the chance and cards, and,
7 well, that duck won't fly.

8 Q. And as a result you rejected that game?

9 A. We rejected the game and told them they should
10 talk to somebody else.

11 Q. Well, I'm sure Hasbro would appreciated that.

12 Can you tell us if you had any responsibilities
13 once you accepted a prototype and before the game was
14 published.

15 A. Once the prototype was accepted, it would go into
16 development to make sure everything was workable. A
17 lot of that required a distillation of the product; in
18 some cases, in most cases a reduction in some features
19 to reduce breakability, to make the game more
20 profitable, to guarantee that we could economically
21 manufacture the game without a lot of returns or
22 defects or other problems that reduces its
23 profitability and increases cost.

24 Q. Once Mayfair and you accepted a game into the
25 line, would you then enter into a contract with the

1 designer, or was there already a contract in place?

2 A. That varied. Sometimes the known designers we
3 would have a contract on in advance, but generally it
4 was after the prototype was accepted.

5 Q. Did you know the terms of those contracts?

6 A. I was expected to know them, and if I didn't know
7 them I better ask.

8 Q. Did you review any other types of contracts when
9 you were at Mayfair?

10 A. I reviewed several thousand contracts in my tour
11 of duty at Mayfair, including freight contracts,
12 leases, distributor contracts, retailer contracts,
13 product submission contracts, trade show contracts.
14 Part of my job as a partner was to review all the
15 contracts.

16 Q. And did you understand the terms of those
17 contracts that you were reviewing?

18 A. I had to understand them, and if I didn't
19 understand them then I have to ask questions, which I
20 did a lot.

21 Q. Are you currently employed, Mr. Carty?

22 A. Yes, sir, I am.

23 Q. Can you tell us a little bit about what your
24 current employment is.

25 A. I'm a consultant to a very prominent board game

1 brand called Catan, which Mayfair was instrumental in
2 building into a global brand and which I was a catalyst
3 in that process, which is why they hired me as a
4 consultant.

5 I own small company in Virginia called Creative
6 Goods Companies. We makes giant board games for floors
7 for companies. We also provide specially-merchandised
8 support for other game companies primarily, and we make
9 floors for booths and things like that in the last
10 year.

11 Q. Did I hear correctly you consult for Catan?
12 That's for Mayfair Games; correct?

13 A. No. Catan was purchased -- Mayfair Games was
14 purchased by Asmodee in 2015, and at that point all my
15 stock and all the other partners' stock were purchased,
16 and I left the company on December 31st, 2015 and I was
17 hired by the Catan folks immediately thereafter as a
18 consultant for Catan.

19 Q. Do you know why the Catan folks hired you?

20 A. Well, Mr. Fenlon, the CEO of the studio, and
21 Mr. Teuber told me I was a catalyst to the success of
22 the brand in the time I was with Mayfair and
23 instrumental in creating their global effect in 45
24 languages now, and at one point Pete Fenlon, the CEO of
25 Mayfair, told me I was driving the bus and had been for

1 years.

2 Q. Are you a member of any professional
3 organizations?

4 A. Yes, sir. I'm a member of the Marine Corps
5 Association. I'm also a member of the Game
6 Manufacturers Association, which is called GAMA. The
7 company belongs to two professional organizations,
8 therefore I'm a member also, and they are PPAI, which
9 is Promotional Products Association International, and
10 ASI, Advertising Specialists International, and they're
11 both organization that bring suppliers and distributors
12 together to provide, well, everything from resalable
13 merchandise to advertising tchotchkes.

14 Q. Have you held any supervisory roles in any of
15 these organizations?

16 A. I was the first non-manufacturer ever elected to
17 the board of directors in the GAMA Association and
18 served on that board for many years, 11 or more. And I
19 was also the secretary of the board after I was the
20 director at large and I served in that capacity for, I
21 don't know, I don't really remember, seven or eight
22 years.

23 Q. Can you give us a general sense of what these
24 organizations are about, what they do, what they
25 attempt to accomplish.

1 A. Well, GAMA is an organization founded by
2 manufacturers to help provide support and regulation,
3 some internal regulation to the game publishers. In
4 the 80s, late 80s we developed a standardization of
5 codes with a distributor division which is there to
6 provide support and advice to the manufacturers on
7 trends. We also had a retail division that did the
8 same sort of thing, but they're from two different
9 viewpoints. And we created a publishers manual for new
10 publishers that explained to them how to properly code
11 and address books and product so that it could be more
12 easily resalable.

13 Q. Can you give us a sense of the members of these
14 organizations.

15 A. The members of GAMA are publishers, there are
16 communicating members that are designers and
17 developers, there are retailer members and wholesale
18 members.

19 Q. Are these individuals that are currently in the
20 industry, have been in the industry? You know, I'm
21 just trying to get a better sense.

22 A. They're pretty much only currently in the
23 industry. There's a few people that kind of hang out
24 still that are emeritus members for one reason or
25 another; but they're pretty much active members in the

1 industry.

2 Q. Okay. Any other organizations? Any online
3 organizations, anything like that?

4 A. I belong to a bunch of news groups which are
5 pretty loose, things on LinkedIn and Facebook, but --.

6 Q. Have you authored any articles or published any
7 other materials in the game industry?

8 A. I wrote a number of articles targeting to
9 retailers, some back in the 90s, generally talking
10 about selecting product for their stores or making
11 their store a better destination. I haven't written
12 anything though for that in that capacity since the
13 late 90s.

14 Q. How about interviews. Have you provided
15 interviews to any sources?

16 A. I have in my career done thousands of interviews,
17 everything from newspapers, magazines, bloggers,
18 video -- I don't know what they call them -- YouTube
19 reporter people. I've been on TV 11 times in the
20 capacity with Mayfair, and in fact one time we actually
21 got on TV with Sunday Morning, and I don't remember the
22 interviewer's name, but he's the gentleman that
23 followed Mr. Kuralt.

24 Q. These interviews, would these have been in the
25 game industry, in particular the board game industry?

1 A. They were all involving the game industry, mostly
2 involving board game trends or practices or new product
3 coming out or family gaming or things like that.

4 Q. I was on your LinkedIn page and I see you have
5 over 500 connections, so I'd like to ask you to explain
6 why connections are important to you or if they're
7 important to you and who your connections generally
8 are, if you can.

9 A. Okay. In my job, and my job as it has been,
10 connections are very important. It's much easier to
11 deal with people you know than people you don't.
12 People do business with people they know; they don't do
13 business with companies generally. And I have contacts
14 up there, everything from people who make components
15 and do printing, to designers, developers, other game
16 company personnel, a couple of artists and authors are
17 connected with me up there, even some fans that are
18 connected; so it's just broad.

19 Q. Do you have any mentors or anybody that's been in
20 the industry that you look up to that you can go to
21 with questions if you have any?

22 A. Well, sadly, they're dead.

23 Q. Is that a recent passing or at some point --

24 A. Two years ago I had a good friend, Bob Boyle, who
25 passed away. Bill Beader (phonetic) died many years

1 ago. He was one of the first reps.

2 Q. But are these individuals that have been in the
3 game industry for many years --

4 A. Many years before me.

5 Q. Okay. And do you have a rough idea how old these
6 individuals were?

7 A. Bob Boyle was in his late seventies. I don't know
8 how old Bill beater was. He died of cancer. There are
9 some people that I'm closely associated with in their
10 late sixties, but beyond that not too many.

11 Q. And these are people you consider mentors, people
12 that you could talk to if you had questions?

13 A. People I would talk to regularly.

14 Q. Do you attend trade shows, toy fairs?

15 A. Yes, sir, I do.

16 Q. Can you give us an idea which toy fairs, game
17 shows you attend?

18 A. This year I've already been to two trade shows.
19 I'm preparing to go to another one. I went to the
20 Nuremberg Toy Fair in Germany specifically for meetings
21 with Cosmos, I had one Asma Gaming meeting, and I met
22 with a couple other publishers there and some other
23 folks to look at games. The New York Toy Fair, which
24 was just recently. and I'm getting ready to go to the
25 game manufacturers show, GES, out in Reno.

1 Q. Switching gears slightly. We talked a little
2 earlier about your experience evaluating product
3 submissions while you were at Mayfair. Do you recall
4 that?

5 A. Yes, sir.

6 Q. Can you tell us -- let me back up. I believe you
7 said you were the gatekeeper; is that right?

8 A. That's the person that has to look at the first
9 instance.

10 Q. Got you. How did you learn that process? Was
11 that always the process in the industry and at Mayfair?
12 I'm just trying to figure out how you came about that
13 process.

14 A. Effectively, I had to do that job as a distributor
15 to select which products we would carry and which ones
16 we would reject, and I built more or less a mental
17 system. With Mayfair we had other concerns about
18 protecting the designer and the company from litigation
19 by pre-reviewing the products to avoid conflicts, and
20 so that was the system that we came up with and it
21 seemed to work pretty well.

22 Q. And that's the process where you said earlier the
23 designers would typically not have a prototype and you
24 would be waiting around for the prototype; is that
25 correct?

1 A. Well, that was the end result at the end of the
2 process, yes.

3 Q. Do you have an understanding of how long it takes
4 to make a prototype from concept to playable model?

5 A. I only have my experience in dealing with the
6 designers and having been a modeler in my teens making
7 plastic models --

8 MR. KRUMHOLZ: I object on relevance because
9 unless it was back in the 1950s and early 1960s there
10 is no relevance to the testimony.

11 THE COURT: I tend to agree.

12 So can you establish that he has any
13 understanding of how long it takes to get from concept
14 to prototype or to commercially, commercial game from
15 the time period in question here?

16 MR. POLLARO: I think we can, your Honor. I
17 think -- two things. I want to point out again, as
18 Mr. Krumholz has pointed out earlier, there is no
19 perfect match so there are not individuals around that
20 have that direct knowledge, so I think both sides are
21 dealing with that. But the second point is obviously
22 Mr. Carty has been in the industry quite some time, and
23 using a date point on what it takes to create a
24 playable model in the time period that he's been in the
25 industry is relevant to determine --

1 THE COURT: Well, I'll let you explore it if you
2 think you can tie it up to the relevant period of time,
3 but if all it is is what it takes now or what it took
4 10 or 20 years ago, it really doesn't help me.

5 Let's take a 10-minute break. We'll be in
6 recess.

7 (Recess)

8 THE COURT: Ready to proceed?

9 MR. POLLARO: Yes, your Honor. Thank you.

10 Q. Mr. Carty, before the break we were switching
11 gears, as I recall, and we were talking and I just want
12 to back up a little bit.

13 Earlier we were talking about your experience
14 evaluating product submissions while you were at
15 Mayfair Games. Do you recall that?

16 A. Yes, sir.

17 Q. And can you tell us how you learned that process.

18 A. In the course of being a distributor, you look at
19 product lines and products to evaluate their
20 saleability by retailers and in the marketplace, by the
21 packaging, the content of the product and their
22 potential; you do it thousands and thousands of times,
23 hundreds of times each month, and you develop a
24 sensibility.

25 Q. Is that something that had been done in the

1 industry before you appeared in the industry?

2 A. Yes, sir.

3 Q. And did you learn that process from people that
4 had done that process before you?

5 A. Some parts of it, yes.

6 Q. Did you have an understand of how long it takes to
7 make a prototype from a concept to a playable model?

8 A. I had firsthand knowledge at Mayfair, but as a
9 distributor there would be different publishers would
10 share stories, probably often nightmare stories, but
11 stories just the same.

12 Q. I appreciate that. Let's stick to Mayfair. I'm
13 trying to talk about that submission process you were
14 in charge of; correct?

15 A. Yes, sir.

16 Q. When you were at Mayfair, and I think you had
17 firsthand knowledge of that timing, do you have an
18 understanding of how long it takes to go from a --
19 sorry -- to create a prototype of a playable model?

20 A. It could generally seem to take several --

21 MR. KRUMHOLZ: I thought we were still on
22 foundational, and so I'm back to the same objection as
23 before the break, which is relevancy.

24 THE COURT: Well, if I understand what
25 Mr. Pollaro is doing, he's setting a foundation for

1 that question that is relevant, so let's see how he
2 does.

3 MR. POLLARO: Thank you, your Honor.

4 **Q.** Sorry, Mr. Carty. Can you tell us what that
5 understanding is of the time it takes to create a
6 playable model for a concept?

7 **A.** Experience dictates that it takes several months,
8 sometimes longer. Sometimes it was years before we
9 actually got a playable model that we could actually
10 enter into a contract with.

11 **Q.** Would that playable model depend on the complexity
12 of the design itself?

13 **A.** Yes, sir. The more complex or involved the
14 product, the longer you generally took to create the
15 model, which is just simply logical. The more
16 components or parts, more moving features, the longer
17 it takes.

18 **Q.** Based on your experience with board games, which I
19 believe you stated began in the 80s and continued at
20 Mayfair, does it take longer to create a prototype of a
21 game now or back in the 80s?

22 **A.** It takes less time now to create a prototype.
23 Technology has made life much simpler for an awful lot
24 of people.

25 **Q.** Based on your experience with board games, does it

1 take longer to create a prototype of a game now or back
2 in the 90s, today versus the 90s?

3 A. Today is much faster.

4 Q. Can you tell us why that is.

5 A. Well, desktop publishing a big factor in all of
6 that. 3-D printers, there are print-on-demand houses
7 where you can print 20 cards if you are trying to do a
8 prototype. There's just a lot more assets available.
9 We have the Internet for communication, which actually
10 speeds things up a great deal. Files can be sent back
11 and forth much easier than they could in the 90s.

12 Q. Have you talked with anyone in the industry about
13 how long it took to create a prototype prior to your
14 entry into the game market?

15 A. A few times.

16 Q. And based on your experience and your
17 conversations, would it take longer to create a
18 playable prototype of a game now or in 1959?

19 MR. KRUMHOLZ: Objection. Foundation.

20 THE COURT: I'll sustain that. You need to
21 establish more with respect to where this is coming
22 from.

23 Q. Can you -- you testified that you spoke with
24 people about the prototype development process; is that
25 correct?

1 A. Yes, sir.

2 Q. Can you tell us a little bit more about who you
3 spoke with with regard to this process.

4 A. I spoke with a number of designers. Craig Taylor
5 comes to mind, but he's passed away. I had
6 conversations with folks at Avalon Hill and Victory
7 Games, SPI, TSR, West End Games. I had conversations
8 with designers at the designer party at the toy fair a
9 couple years in a row when I was fortunate enough to
10 get invited, a variety of people who talked about
11 different things.

12 Q. And would any of these individuals have experience
13 developing prototypes in the 1959-1960 time frame?

14 A. I believe some of them did.

15 Q. So based on your experience, would it take longer
16 to create a playable prototype of a game now or in 1959
17 or 1960?

18 MR. KRUMHOLZ: Same objection.

19 THE COURT: Again, I'm going to sustain it.
20 It's too vague at this point. Who, how many, what was
21 their experience, you need to do more.

22 MR. POLLARO: Thank you, your Honor.

23 Q. Mr. Carty, can you give us a little bit more
24 detail about the conversations that you had with
25 individuals that were in the industry creating

1 prototypes in 1959 or 1960?

2 A. I don't know what years, and I had conversation
3 with Mr. Sackson about when he was creating the game
4 called Acquire. I don't remember what year that was.
5 I remember him saying that to make the -- it took him
6 quite a while to get, to take it from concept to the
7 prototype he submitted.

8 Q. Can you tell me generally how long you believe
9 that time was.

10 A. It was a couple of months, four, five. I don't
11 remember clearly. That was 1996 when I met him. It's
12 a long time ago.

13 Craig Taylor I talked to when he was talking
14 about Wooden Ships Iron Men, which is an iconic board
15 name, about how long it took him to make all the ship
16 cards and pieces for the board. Apparently it took him
17 quite a while, a couple of months to make the parts.

18 MR. KRUMHOLZ: Your Honor, I'm sorry. Before he
19 goes on, excuse me, repeating these conversations,
20 could we establish whether these people knew anything
21 relevant, what their time frame was? It's all hearsay.

22 THE COURT: I understand, but the fact that it's
23 hearsay, if it is going into an opinion that is an
24 opinion that he's developed is not impermissible in
25 itself.

1 But Mr. Krumholz is right; it's unclear what
2 time frame any of these things relates to, the Acquire
3 or Wooden Ships Iron Men. I mean I don't know, so you
4 need to ask more questions.

5 MR. POLLARO: I understand that, your Honor. I
6 appreciate that.

7 Q. Mr. Carty, can you give us any more detail about
8 the timing of the events that we're discussing about
9 the prototype creation based on your conversation
10 with --

11 A. It was so long ago I don't really -- I don't
12 remember.

13 Q. Do you have an estimate of, say, in 1996 when you
14 had the conversations how old these individuals were?

15 A. Sid Sackson was probably in his eighties.

16 Q. He was in his eighties s in 1996; is that correct?

17 A. Yes, sir. Late seventies, at least.

18 Q. And you believe he was in the game industry?

19 A. He is a well-known designer. He's got -- he had
20 many very popular and sometimes iconic titles. A lot
21 of people looked up -- he was, he had a lot of product
22 published, and he was successful.

23 Q. Do you know that he was in the game industry in
24 1959?

25 A. I believe he was, but I couldn't prove that, sir.

1 Q. Do you have any more detail about when this game,
2 I believe it's called Acquire, came out?

3 A. I don't know who the original publisher was, but I
4 believe it was 3M Games and then Avalon Hill, and when
5 I became familiar with it I owned a 3M copy, but I
6 don't remember the copyright date or any of that. And
7 I sold the game when I worked in distribution when it
8 was an Avalon Hill product.

9 Q. Could the game have been available in 1959?

10 A. Sir, I don't know.

11 Q. But could it have been available?

12 A. I suppose.

13 MR. KRUMHOLZ: Objection.

14 THE COURT: Okay. That is calling for
15 speculation. If he knows if it was available, he can
16 answer that.

17 MR. POLLARO: Okay.

18 Q. So Mr. Carty, I want to go back to your testimony
19 about the timing of creating a prototype in the, since
20 you entered the industry in 19 -- in the 80s. I
21 believe you testified that between the 1980s and today,
22 it would take longer to create a prototype in the 80s.
23 Do I have that right?

24 A. Yes, sir.

25 Q. And now if we use the mid 90s or the time you were

1 at Mayfair Games, it takes longer in the 90s versus
2 today. Is that what your testimony is?

3 A. Yes, sir.

4 Q. And then I think you said previously that compared
5 between the 80s and the 90s it would take longer in the
6 80s; is that correct?

7 A. Yes, sir.

8 Q. While you were at Mayfair Games for the
9 approximately 20 years you were there, did the time it
10 took to create a prototype decrease from, say, mid 90s
11 to when you left in 2015?

12 A. Yes, sir, it did.

13 Q. It did. It became faster?

14 A. Yes, sir.

15 Q. Do you have any reason to believe that that trend
16 will not continue in the future?

17 A. No, sir, I do not.

18 Q. Do you have any reason to believe that that trend
19 didn't occur in the past or before you got into the
20 game industry?

21 A. No, sir.

22 Q. Have you reviewed the images of the prototype in
23 this case?

24 A. Yes, sir.

25 MR. POLLARO: May I approach, your Honor. I

1 want to show him a picture of the prototype.

2 THE COURT: Yes. Do you need an easel?

3 MR. POLLARO: I do.

4 MR. KRUMHOLZ: We have some back here. Take
5 one.

6 MR. POLLARO: May I approach, your Honor.

7 THE COURT: Sure.

8 Q. Can you see that, Mr. Carty?

9 A. Yes.

10 Q. I've placed next to you, Mr. Carty, what's
11 identified as PTX12. Have you seen this image before?

12 A. Yes, sir, I have.

13 Q. Do you understand that would be the image of the
14 prototype of The Game of Life?

15 A. Yes, sir, I do.

16 Q. I'm just curious, have you seen in your lengthy
17 experience any game submissions that included a box
18 with graphics?

19 A. No, sir, I have not.

20 Q. Based on your experience, can you compare the
21 prototype in the image next to you to the hundreds of
22 prototypes that you have reviewed and analyzed?

23 A. Well, this is an outstandingly complete prototype.

24 Q. What exactly do you mean by that?

25 A. It's complete. Beyond distillation process and

1 making sure that you don't have breakables on the
2 board, it's almost ready to go to press.

3 Q. Are you aware that it has been alleged that the
4 entire prototype, soup to nuts, was created in six
5 weeks?

6 A. That would be incredible.

7 MR. KRUMHOLZ: Objection. Move to strike that
8 answer. This is what they were trying to set the
9 predicate for, which they never set, to give that.

10 THE COURT: So I'll sustain that objection.

11 And you may ask -- what you actually asked him
12 is whether he's aware of that allegation that that was
13 created in six weeks, so let's establish his awareness
14 first; and then if you want to ask him if he has an
15 opinion on that, you need to be clear on what the basis
16 of that opinion would be.

17 MR. POLLARO: Thank you, your Honor.

18 Q. Are you aware that it has been alleged that the
19 entire prototype was created in six weeks or less?

20 A. Yes, sir.

21 Q. Based on your experience in the industry, would it
22 be possible to design and build a prototype of The Game
23 of Life from a concept to the prototype that you see
24 there in six weeks?

25 MR. KRUMHOLZ: Objection.

1 THE COURT: I'm going to overrule the objection.
2 I am going to allow him to answer. I think you can
3 handle it effectively on cross-examination, so you go
4 ahead and answer that question.

5 A. I think it's highly unlikely.

6 Q. How about if I told you that that prototype was
7 created in four weeks. Based on your experience would
8 it be possible to design and build the prototype that
9 you see before you in four weeks?

10 A. Even less likely.

11 Q. Can you tell us upon which you base that
12 statement.

13 A. Just the processing of the requests and the delays
14 and receiving prototypes over the years. It always
15 seems to take a lot longer.

16 Q. And remind me again how this prototype that you
17 see here compared to the hundreds of prototypes that
18 you reviewed when you were at Mayfair Games.

19 A. Well, the box is complete, the little cars are
20 there, the mountains, the spinner. It seems to be a
21 complete playable prototype with all the bells and
22 whistles attached.

23 Q. Would that, based on your prior testimony and your
24 experience, would that mean that it would take longer
25 relatively for a prototype to be created, in your

1 experience, or less time?

2 A. Given all the different prototypes I've looked at
3 over the years, it seems like it always takes longer
4 for more involved and complex designs to be prototyped
5 than simpler ones, so I would have to say this takes
6 longer than a simpler game.

7 Q. I think I want to switch gears.

8 MR. POLLARO: Your Honor, would you like me to
9 take the image down, or are you okay with leaving that?

10 THE COURT: It's up to you.

11 MR. POLLARO: I'm fine with leaving it.

12 Q. Thank you, Mr. Carty. So switching gears again
13 slightly. So we talked about the process you undertook
14 in accepting or rejecting games. Do you recall that?

15 A. Yes, sir.

16 Q. I want to talk about the case where a game has
17 been accepted. Are you with me?

18 A. Yes, sir.

19 Q. But by that point would Mayfair have a contract
20 with the game designer?

21 A. Yes, sir, we would.

22 Q. Would the contract always be with the game
23 designer, or would it be with anyone else, the
24 designer's agent or anything like that?

25 A. It could be either.

1 Q. It could be either. And are you familiar with
2 contracts in both situations?

3 A. Yes, sir.

4 Q. Would the contracts that you were familiar with
5 impose any obligations on Mayfair?

6 A. There were often delivery clauses where we had to
7 produce and market the product within a certain given
8 window or there were consequences.

9 Q. And it's a contract, right, so both parties have
10 obligations; right?

11 A. Yes, sir, they do.

12 Q. Are you aware of any instances where Mayfair, in
13 your experience, was unable to fulfill its obligations
14 for one reason or another under the contract?

15 A. Regrettably, there were several.

16 Q. Were those important or less important? I guess
17 I'm trying to get a sense of were they fundamental to
18 the contract or were they something that you would call
19 more administerial?

20 A. They were all cases where for one reason or
21 another we couldn't deliver the product on time. It
22 was within any kind of reasonable extension of the time
23 frame, and so we had to return the design to the
24 designer.

25 Q. Would you call that an important component to the

1 contract if you were not able to deliver based on a
2 certain time frame?

3 A. Yes, sir.

4 Q. In those instances that Mayfair wasn't able to
5 fulfill its obligations under the contract, what would
6 typically happen?

7 A. We would --

8 MR. KRUMHOLZ: I'm sorry, your Honor. There's a
9 relevancy objection, but also this is way outside the
10 scope of his reports, as I recall. I don't remember
11 this being disclosed at all.

12 THE COURT: I'm not sure what you're getting
13 into here, so I'm not sure what to do with this
14 objection. What are you doing here?

15 MR. POLLARO: I can assure you it's in our
16 reports and will probably come clear in another couple
17 of questions.

18 THE COURT: Then go ahead and let's see.

19 MR. POLLARO: As a matter of fact it might be
20 this question.

21 Q. So in those instances that we were talking about
22 where there was an important -- I don't know, for lack
23 of a better term -- a term that Mayfair couldn't comply
24 with, I think we were using the timeliness as an
25 example. So in those instances where in your

1 experience Mayfair couldn't fulfill its obligations
2 under the contract, what would typically happen?

3 A. We would return the rights to the design to the
4 designer and often the prototype, not always, and we
5 were no longer going to publish the product.

6 Q. Could that designer take that design anywhere it
7 wanted?

8 A. Yes, sir.

9 Q. Is that common in the industry?

10 A. It's common and normal.

11 Q. Is that something that you dealt with or seen in
12 your experience in the industry?

13 A. Yes, sir.

14 Q. Is that something that you have discussed and
15 talked about with people in the industry?

16 A. Certainly.

17 Q. Is there anything unusual about that concept?

18 A. Not to my knowledge. I believe it's normal.

19 Q. In your experience is it industry practice for
20 when the game went back to the designer -- let me ask a
21 better question.

22 Is it identified in the contract typically, in
23 your experience, where the game is being reverted to?

24 MR. KRUMHOLZ: Your Honor, I object on two
25 grounds. One is I still don't see the relevance of any

1 of this; two, we're also talking present, not 1959.

2 THE COURT: Right. And Mr. Pollaro is trying to
3 make a connection between the present and past, but I'm
4 going to give him some latitude here, so overruled.

5 Go ahead.

6 MR. POLLARO: Thank you, your Honor. And just
7 so we're clear, we don't believe -- you know, contracts
8 are contracts. We don't believe there's any time
9 component, they were interpreted one way in 1959 and
10 one way in 1999, so.

11 THE COURT: Go ahead with the question.

12 MR. POLLARO: Thank you, your Honor.

13 Q. Based on your experience, does this reversion of
14 rights that we've been talking about, this concept of
15 reverting the game back to the designer, so in the
16 provision you view does it generally indicate who the
17 creator of the work is?

18 A. In the contracts that we signed?

19 Q. Yes.

20 A. Yes, sir, it did.

21 Q. Have you reviewed and understood contracts that
22 include the concept we've been discussing?

23 A. Yes, sir.

24 Q. You have done that personally?

25 A. Yes, sir.

1 Q. Have you discussed those concepts with individuals
2 in the industry?

3 A. Yes, sir, I have.

4 Q. Based on your experience, would you recognize
5 language in a contract like we've been discussing?

6 A. I believe I would.

7 Q. Have you reviewed the assignment agreement in this
8 case?

9 A. Yes, sir, I have.

10 Q. If you could turn to Tab 11 in the binder in front
11 of you.

12 THE COURT: Could you tell me what exhibit?
13 This is an already admitted exhibit, right, so just
14 remind me what number it is in this binder I have.

15 MR. POLLARO: It is GTX2 (sic).

16 THE COURT: 2. Thank you.

17 Q. Mr. Carty, let me ask one question before I get to
18 the document we're talking about. Do you recall
19 reviewing any contracts from the 1959 time frame?

20 A. Only regarding this case.

21 Q. Okay. So are you with me on Tab 11?

22 A. Yes, sir.

23 Q. Do you recognize that document?

24 A. Yes, sir.

25 Q. Does that look like the assignment agreement that

1 you reviewed in this case?

2 A. Yes, sir, it does.

3 Q. Can you identify for the Court the portion of the
4 assignment agreement that you believe that retains
5 express reservation rights to Bill Markham?

6 MR. KRUMHOLZ: Your Honor, objection to the
7 extent they're offering the witness to interpret the
8 contract.

9 THE COURT: Right. I'm not sure what you're
10 doing here, but the contract speaks for itself. It's
11 the assignment agreement.

12 What is it you're -- I'm not sure what it is
13 you're trying to get at with the witness as to this
14 contract.

15 MR. POLLARO: This witness has experience with
16 contracts in this industry, the custom and practice,
17 and I'm just having him apply that industry knowledge
18 to the facts.

19 THE COURT: For what purpose? I don't
20 understand. The contract is the contract. I will
21 interpret the contract based on facts that we get into
22 evidence here. But you're asking him to interpret for
23 me what the contract says?

24 MR. POLLARO: I'm asking as someone who is in
25 the industry customarily would understand what the

1 terms that he deals with every day is. And honestly
2 Mr. Orbanes doesn't talk about it at all, so, quite
3 frankly, Mr. Carty is the only that's one able to look
4 at it because he deals with it every day and
5 understands what this means.

6 MR. KRUMHOLZ: There's a reason, your Honor,
7 that Mr. Orbanes is not talking about it. It's not
8 appropriate.

9 THE COURT: What I'm hearing you say is that
10 you're going to be asking the witness to give his
11 opinion as to what the contract means. Is that what
12 you're --

13 MR. POLLARO: I was trying to do it from the
14 other way, but I appreciate --

15 THE COURT: What do you mean the other way?

16 MR. POLLARO: Based on his experience, and
17 basically not as a lawyer, not interpreting the
18 contract, but just looking at a contract and saying
19 this is what I dealt with every day.

20 THE COURT: What value does that have to what I
21 have to decide? I'm not sure I understand.

22 MR. POLLARO: How the industry -- what is
23 customary practice in the industry that Mr. Carty can
24 talk about.

25 THE COURT: Well, he's testified that it's

1 common in the industry that the designer would retain
2 rights, and it may be that this contract is consistent
3 with that. Is that what you're trying to show?

4 MR. POLLARO: That is what I'm trying to show,
5 your Honor.

6 THE COURT: All right. So, well, I'll let you
7 ask him to point to the portion of this contract that
8 he believes does that if that -- I'll let you ask him
9 that.

10 MR. POLLARO: Thank you, your Honor.

11 Q. Mr. Carty, can you point to the portion of this
12 contract that you believe is consistent with your prior
13 testimony that reservation of rights is customary in
14 the game industry.

15 A. I believe it's page 4, Section 4, about six lines
16 down.

17 Q. Can you read that into the record.

18 A. (Reading) Markham will assign any such copyright,
19 trademark, patent, or application therefor to Link,
20 provided that said assignments will revert to Markham
21 on the termination of this agreement.

22 Q. Thank you, Mr. Carty. Now, is the language you
23 just read standard customary practice in the industry,
24 as far as you know, based on your experience?

25 A. As far as I know.

1 Q. Thank you. In your experience is it common for a
2 designer of a game to be credited as the designer on
3 the box?

4 A. It is a common and normal practice.

5 Q. Did Mayfair have a policy regarding placement of a
6 designer's name on the box?

7 MR. KRUMHOLZ: I'm sorry, I didn't hear his last
8 answer, whether it was or was not.

9 THE COURT: He stated that it was a common and
10 normal practice.

11 MR. KRUMHOLZ: Thank you. I apologize.

12 Q. Did Mayfair have a policy regarding placement of a
13 designer's name on the box?

14 A. Yes, sir, we did.

15 Q. What was that policy?

16 A. Generally -- well, it went on the box; sometimes
17 on the back, most of the time on the front, depending
18 on the cover art and other elements therefor.

19 Q. Can you tell us a little bit about your
20 understanding of what the policy is in the industry.
21 For example, does -- are you aware that the industry
22 had a particular policy about placement of the
23 designer's name on the box?

24 A. I know that prior to the late 80s it was not
25 common for designers' names to be placed on product

1 covers.

2 Q. So from the late 80s it went from being uncommon
3 to being more common? Is that what your testimony is?

4 A. Yes, sir. That's my experience.

5 Q. Okay. Are there any companies in particular that
6 you're aware of that had policies that changed?

7 A. Well, Avalon Hill, Victory Games, they originally
8 did not ever include the designer's name on the box,
9 but as time passed they began to include it. I'm sure
10 there are other examples, but that's all I remember
11 offhand.

12 Q. Is the person credited on the box as the designer
13 typically the person who created the game?

14 A. Yes, sir, they are.

15 Q. In your experience would the prototype received
16 from the designer that you reviewed ever be identical
17 to the final product that you published?

18 A. No, sir, it would not.

19 Q. What types of changes are typically made?

20 A. The changes were all directly related to
21 manufacturing and cost of goods, and it was always
22 about reduction simplification to make the game easier
23 to manufacture, reduce breakage, and increase
24 profitability.

25 Q. And why is that done?

1 A. In the end? So you can be solvent and make money.

2 Q. Would you, as someone who was involved in that
3 process at Mayfair Games, consider that process
4 creative?

5 A. No, sir. I would consider it normal. It's
6 routine. It's reduction of elements. I don't
7 generally consider it creative. We did it every day.

8 Q. To make more money; right? Is that what you said?

9 A. Yes.

10 Q. When you were at Mayfair would you consider
11 yourself the creator of a game when you were
12 responsible for simplifications like this?

13 A. No, sir.

14 Q. Did you, in your experience, have occasion to make
15 simplifications between a prototype and a published
16 version of the game?

17 A. It happened every time.

18 Q. And --

19 A. With almost every prototype we ever received we
20 had to make simplifications and changes to be able to
21 manufacture the game to begin with.

22 Q. And your testimony is that you personally had
23 experience doing that?

24 A. Yes, sir, I did.

25 Q. And that's, as I understand your testimony,

1 customary in the industry?

2 A. Yes.

3 MR. KRUMHOLZ: Sorry, your Honor. Again, this
4 is my renewed objection. The custom in the industry
5 today, there's no temporal time frame here.

6 THE COURT: Right, I understand your objection.
7 I'm going to let you handle that aspect of it on
8 cross-examination.

9 Q. Did you review the 1960 version of The Game of
10 Life?

11 A. Yes, sir, I did.

12 Q. Did your review include reviewing the rules, the
13 game board, and the box?

14 A. Yes, sir.

15 Q. Did you compare the 1960 version of The Game of
16 Life to the prototype?

17 A. Yes, sir.

18 MR. POLLARO: May I approach, your Honor. I
19 have another demonstrative.

20 THE COURT: Yes.

21 (Pause)

22 MR. POLLARO: May I approach, your Honor.

23 THE COURT: Yes.

24 Q. Can you see?

25 A. Yes, sir.

1 Q. I believe I asked you if you compared the
2 prototype versus the 1960 version of the game, and you
3 said yes. Is that correct?

4 A. Yes, sir.

5 Q. Do you recognize the image on your right, which
6 I'll represent to everyone is a blowup of an exhibit in
7 Mr. Orbanes' expert report of the 1960 copyright
8 game -- let me back up. It's a Game of Life bearing a
9 1960 copyright date that was put in Mr. Orbanes'
10 report.

11 Now my question to you, Mr. Carty, is do you
12 find any similarities between the two?

13 A. There are certainly similarities, and there are
14 differences.

15 Q. Okay. So let's talk about the differences. What
16 differences do you see?

17 MR. KRUMHOLZ: Your Honor, I have mixed feelings
18 with my objection. There clearly are differences, but
19 he's not disclosed anything in the report about
20 differences. That's one of the fundamental problems
21 with his analysis. And I have to object and I'm trying
22 to correct that now because I don't think he can talk
23 about the differences because he never did, and I don't
24 know what he's going to say.

25 THE COURT: All right. Mr. Pollaro, was this

1 disclosed, this testimony?

2 MR. POLLARO: He absolutely looked at the two.
3 He certainly compared the two games. I can find out
4 where exactly that is in the report.

5 THE COURT: Well, Mr. Krumholz, I'm looking at
6 page 32 of his report and it looks like in paragraphs
7 81 and 82 and 83 there is some significant discussion
8 about comparing the 1960 game and the prototype.

9 MR. KRUMHOLZ: I don't dispute that. What he
10 has done is he has identified some similarities and
11 without identifying differences, and then he wants to
12 opine that it's not a derivative work by only focusing
13 on similarities, and that's a fundamental
14 methodological flaw. You can't determine whether
15 something is a derivative work without seeing whether
16 there's any original content that was added. And he
17 doesn't disclose anywhere in the reports what the
18 differences are and therefore whether they're
19 significant or not. In contrast to what Mr. Orbanes
20 did, where he identified similarities and then
21 identified differences and explains the significance of
22 that.

23 So he's now going to try to correct that by
24 getting up and saying here's a difference but it
25 doesn't matter, here's a difference but it doesn't

1 matter. There's been no disclosure of that, and I
2 would be hearing him for the first time today.

3 And I can point you to places where I
4 specifically asked him whether he needed to look,
5 whether he felt he needed to look at differences, and
6 the answer was no, he didn't look at differences.

7 I think in his rebuttal report, paragraph 42, if
8 my outline works like it should, yes, paragraph 42, he
9 says Mr. Orbanes' analysis regarding the differences
10 between The Game of Life prototype --

11 THE COURT: Slow down.

12 MR. KRUMHOLTZ: Sorry.

13 THE COURT: I can read it.

14 MR. KRUMHOLZ: All right.

15 (Pause)

16 MR. KRUMHOLZ: And I can also point you to two
17 places in his deposition I specifically asked him
18 whether he looked at differences, and he said he did
19 not.

20 THE COURT: Well, hang on a minute. I'm looking
21 at the witness's report, paragraph 82 and the beginning
22 of 83, and putting aside -- and taking the first
23 sentence of 82, "I've reviewed multiple versions of the
24 1960 Game of Life and cannot detect any nontrivial
25 differences between the versions."

1 MR. KRUMHOLZ: That's the extent of his opinion.

2 THE COURT: Well, so he's disclosed at least
3 that opinion.

4 MR. KRUMHOLZ: And if he -- well, I would object
5 because of *ipse dixit*, but that as an aside, yes, I
6 mean that was disclosed. But I understand the question
7 to be to start identifying what the differences are,
8 which there are many, I assume for the purposes of him
9 elaborating on whether he thinks those differences are
10 significant or not. That's what Mr. Orbanes is going
11 to be talking about and that's what we fully disclosed,
12 and they had the opportunity to question him at
13 deposition on that at length. I've had no such
14 opportunity.

15 THE COURT: Well, I'm not sure why you say you
16 haven't had the opportunity. He expressed these
17 opinions in paragraph 82 and paragraph 83, and you had
18 the opportunity to question him about the basis of
19 those opinions; right?

20 MR. KRUMHOLZ: I did at deposition, and I'll
21 pull it out and give you the transcript. I asked him
22 whether he looked at differences, and he said he did
23 not, so there was nothing left to ask.

24 THE COURT: Well, I think you can deal with that
25 when you cross-examine him.

1 MR. KRUMHOLZ: Respectfully, your Honor, that I
2 can't deal with on cross-examination because that's a
3 disclosure issue. Now I'm going to hear for the first
4 time what these supposed differences are and why they
5 do or don't matter, and I will not have had the
6 opportunity to ask him about that because that was
7 never disclosed. That is not about me, you know,
8 whether he's qualified to talk about it or the like;
9 it's whether I've been ambushed on this.

10 THE COURT: All right. I appreciate your
11 concern. What I'm going to do is take this testimony
12 and then we'll see where we are. I do understand what
13 you're getting at, but let me hear what the testimony
14 is first.

15 MR. KRUMHOLZ: Okay.

16 THE COURT: Okay. Mr. Pollaro, you can ask your
17 questions.

18 MR. POLLARO: Thank you, your Honor.

19 Q. Mr. Carty, to back up to level set us. So I
20 believe your testimony was that you did compare the
21 prototype, that's there on your left, versus the 1960
22 version of the game, of which the image on your right
23 is one.

24 A. Yes, sir.

25 Q. And did you find similarities?

1 A. Yes, sir.

2 Q. Did you detect any differences?

3 A. Yes, sir.

4 Q. Can you identify the differences that you
5 identified in your report as nontrivial.

6 A. Well, they changed some of the hills or the hills.
7 They removed the oil derrick. There were other changes
8 made which appear to have been made for manufacturing
9 purposes and to reduce costs and remove breakable
10 things off the board. They kept the spinner and the
11 track. There may have been rearrangement of the track
12 for any number of reasons. But most of these would be
13 in the distillation process, making a prototype and
14 making it produceable in an economical manner.

15 Q. Are these nontrivial differences that you just
16 identified consistent with your experience that
17 simplifications are made to prototypes following
18 product submissions before publication?

19 A. Yes, sir, they are.

20 Q. Are the changes that you identified between the
21 1960 edition on your right and the prototype on your
22 left in line with your experience that companies make
23 changes for monetary reasons?

24 A. Yes, sir.

25 Q. Did you personally make changes to prototypes for

1 monetary reasons before publication while you were at
2 Mayfair Games?

3 A. Yes, sir.

4 Q. Do you believe that to be standard and customary
5 practice in the industry?

6 A. I do.

7 Q. Do you have any reason to believe that it would
8 not have always been customary and standard practice in
9 the industry?

10 A. I have no reason to believe that.

11 Q. The mentors that you relied on in the game
12 industry, were they in the game industry to make money?

13 A. Yes, sir.

14 Q. Were the manufacturers that you discussed or
15 talked to during the course of your career, were they
16 in the industry to make money?

17 A. Absolutely.

18 Q. How many editions of The Game of Life have you
19 reviewed?

20 A. I don't know the exact count, but through
21 pictures, hundreds, more than a hundred. I don't
22 really -- there are a lot.

23 Q. Have you reviewed the current version of The Game
24 of Life?

25 A. Yes, sir, I have.

1 Q. Have you reviewed the rules of the current version
2 of The Game of Life?

3 A. Yes, sir.

4 Q. How about the cover. Have you reviewed the cover
5 for the current Game of Life?

6 A. I have seen it.

7 MR. POLLARO: May I approach, your Honor.

8 THE COURT: Yes.

9 (Pause)

10 Q. Do you see that, Mr. Carty?

11 A. Yes, sir, I can.

12 Q. Can you tell me what that is.

13 A. That would be the game board or the current or
14 what I think is the current edition for The Game of
15 Life.

16 Q. And did you review the current version of The Game
17 of Life, which is on the right there, as part of this
18 case?

19 A. Yes, sir.

20 Q. So I want to ask you to assume for a second for
21 this question that the prototype on your left is on the
22 market and being sold and it was the only edition of
23 The Game of Life on the market. Are you with me?

24 A. I'm with you.

25 Q. So based on your experience reviewing product

1 submissions, if someone presented you with the current
2 version of The Game of Life which is on the right,
3 would you accept or reject that product?

4 MR. KRUMHOLZ: Objection on relevancy grounds,
5 and also this is outside the disclosure of the reports.

6 THE COURT: So what's the relevance of this?
7 Whether he would accept or reject this as a concept or
8 as a game now? What does that have to do with this?

9 MR. POLLARO: Because that analysis incorporates
10 the similarities, differences, the overall look and
11 feel and so --

12 THE COURT: How? I'm not sure I understand. I
13 don't understand what you're saying.

14 MR. POLLARO: What I'm saying is in Mr. Carty's
15 experience reviewing game submissions, he would look at
16 all those factors as he's accepting or rejecting a
17 product.

18 THE COURT: I guess what I'm saying, what I
19 don't understand is how does the fact that he would
20 accept or reject a proposal, for whatever reason, how
21 does that relate to the question of derivative works
22 here?

23 MR. POLLARO: Basically whether it's the same
24 game or not. We have differences of opinion about
25 whether things are derivative or the same game or not,

1 and so derivative is one-half of the question.

2 THE COURT: But you're not connecting the fact
3 that he might decide to accept it or reject it to even
4 that question. I'm not sure that's the right question,
5 but even if it is, what does his decision about whether
6 to accept something or not have to do with that? I
7 don't get it.

8 MR. POLLARO: It may be ships passing in the
9 night, but I believe he testified earlier that he looks
10 at all those factors that go in to determining whether
11 or not it's a derivative work or an independent work.
12 He effectively was doing that in product submissions,
13 in charge of product submissions at Mayfair Games, and
14 so I'm trying to elicit --

15 THE COURT: So maybe I get it now. So you're
16 saying this is -- you're asking him kind of the
17 equivalent of that Monopoly example that he gave
18 before? Is that what you're getting at?

19 MR. POLLARO: Yes, your Honor, exactly what I'm
20 getting at, your Honor. And so again, based on his
21 industry experience and custom and practice --

22 THE COURT: I'm not going to let you get it that
23 way. You can try to get at it in a more precise way
24 than that.

25 Q. Looking at the current version of The Game of Life

1 on the right, do you see similarities between that and
2 the prototype?

3 A. Yes, sir, I do.

4 Q. Do you have any understanding under which product
5 code the current Game of Life is sold?

6 MR. KRUMHOLZ: Objection. Relevance.

7 THE COURT: Product code?

8 MR. POLLARO: SKU.

9 THE COURT: What does that have to do with
10 anything?

11 MR. POLLARO: The current version of The Game of
12 Life is sold under the same SKU as the 1960 version.

13 THE COURT: Okay. Well, I'm going to sustain
14 the objection. I don't think that's relevant.

15 Q. Mr. Carty, looking at the current Game of Life on
16 the right, I believe you said you see similarities.

17 A. Yes, sir.

18 Q. Can you tell me or tell the Court what those
19 similarities are.

20 A. Well, the spinner is the big similarity, the book
21 folding board. A lot of glare --

22 MR. KRUMHOLZ: I didn't hear the words.

23 THE WITNESS: I said there's a lot of glare.
24 Sorry.

25 A. I've derailed my train of thought.

1 The overall goals and feel of the game is very
2 similar to the 1960s Game of Life. I've read through
3 the rules. I find them very similar. And it as the
4 spinner.

5 Q. Yes, I understand, it has the spinner. I see
6 that.

7 And did you, did I hear you correctly that you
8 said you reviewed the rules of both versions?

9 A. Yes, sir.

10 Q. And what was your conclusion?

11 A. The play style is basically the same. I mean
12 there are differences in the tracks, but there's a
13 track on both boards, but there are differences. There
14 are evolutionary changes that have occurred. There's
15 still play money in both games. The overall goal is
16 to, well, make a lot of money in this game.

17 Q. Are you aware of the precise number of versions of
18 The Game of Life between the 1960 edition and the
19 current Game of Life?

20 A. No, sir, I am not.

21 Q. Do you know if anybody knows the number of
22 versions between the 1960 edition of The Game of Life
23 and the current?

24 MR. KRUMHOLZ: Objection. Foundation.

25 THE COURT: Well, he was asking if he knows. He

1 can answer that yes or no.

2 MR. KRUMHOLZ: Yes, he did, and he asked whether
3 he knows and anybody else.

4 THE COURT: Right. But he can answer that
5 question. It's overruled. He can answer that
6 question, if he knows.

7 Do you know of anyone who knows the number?

8 THE WITNESS: No, sir, I do not.

9 THE COURT: Okay.

10 Q. Thank you, Mr. Carty. I'm going to switch gears a
11 little bit. In your experience is an individual's
12 reputation important in the game industry?

13 A. Reputation is critical.

14 Q. In your experience do individuals attempt to
15 associate themselves with successful games with which
16 they've been involved --

17 MR. KRUMHOLZ: I hate to keep interrupting, your
18 Honor, but relevancy, and there wasn't disclosure on
19 this at all.

20 THE COURT: All right. What do you say to that?

21 MR. POLLARO: I will have to find that, your
22 Honor.

23 (Pause)

24 MR. POLLARO: I apologize, your Honor. In
25 paragraph 69 of Mr. Carty's report, page 28.

1 (Pause)

2 THE COURT: All right. I think all of this
3 falls into the category of what I told you at the
4 beginning of the hearing today that I was not going to
5 allow in terms of expert opinion, so I'm going to
6 sustain the objection.

7 MR. POLLARO: I appreciate that, your Honor. My
8 intention was just to have him, as someone in the
9 industry, to understand how important reputation was
10 and what a letter to the industry, someone like him,
11 would mean so I was trying to connect it directly to
12 his experience.

13 THE COURT: I understand, but the ultimate
14 purpose of it is to obtain an opinion with respect to
15 and a comment upon the credibility of other testimony
16 in the case, so I'm not going to allow that.

17 MR. POLLARO: Thank you, your Honor.

18 I have no further questions.

19 THE COURT: Thank you.

20 MR. KRUMHOLZ: It's 11:50. Do you want us to
21 start or take a lunch break? It takes a few minutes to
22 set up.

23 THE COURT: Let's go off the record for a
24 moment.

25 (Discussion off the record)

1 THE COURT: Mr. Carty, the rule is that you
2 can't have any conversations with attorneys about your
3 testimony while you are on the stand, so that doesn't
4 prohibit you from being together during the lunch hour,
5 but it does prohibit you and them from having any
6 conversation about your testimony. Do you understand
7 that?

8 THE WITNESS: Yes, your Honor.

9 THE COURT: We'll be in recess. See you at
10 1:15.

11 (Recess)

12 THE COURT: Ready for cross-examination. Let's
13 get the witness back on the stand.

14 Mr. Carty, --

15 MR. KRUMHOLZ: Yes, your Honor.

16 THE COURT: -- welcome back, sir.

17 You may inquire, Mr. Krumholz.

18 MR. KRUMHOLZ: Thank you, your Honor.

19 CROSS-EXAMINATION BY MR. KRUMHOLZ:

20 Q. Good afternoon, Mr. Carty. As we established this
21 morning, you were not in the game industry in 1959;
22 correct.

23 A. That's true.

24 Q. Nor were you in the 1960s or 1970s, or about half
25 of the 1980s; correct?

1 A. That is correct.

2 Q. To the extent you know anything about what may
3 have happened or what custom and practice might have
4 been in the late 1950s, it's because of things that
5 people may have told you over the years.

6 A. Yes, sir.

7 Q. And even in that instance, you're not terribly
8 sure what time frame they might have been talking about
9 when they were sharing whatever information they
10 shared. Is that fair?

11 A. Yes, sir.

12 Q. Okay. But you did give some testimony about your
13 experience doing development work; correct?

14 A. Yes, sir.

15 Q. And that is -- and development work is the work
16 for taking a prototype and getting it to a commercial
17 product. Fair?

18 A. Yes, sir.

19 Q. And that's something that's done by the game
20 manufacturer?

21 A. Game publisher, manufacturer, yes, sir.

22 Q. And by "publisher, manufacturer," we're talking
23 about the same thing, essentially.

24 A. Yes.

25 Q. A company like Hasbro.

1 A. Yes, sir.

2 Q. Or Mayfair.

3 A. Yes.

4 Q. And you were deeply involved in that for a number
5 of years; correct?

6 A. Yes, sir.

7 Q. And at Mayfair you had anywhere from 12 to 20
8 people at various times doing that kind of development
9 work; is that right?

10 A. It's pretty close.

11 Q. And it could take I think you said anywhere from
12 three months to several years to get a product from
13 prototype to commercial product on a marketplace.

14 A. Yes, sir.

15 Q. And to do that, obviously the people in the
16 company were using the experience that they had
17 accumulated over the years to get that prototype to a
18 successful, hopefully successful commercial product;
19 correct?

20 A. Yes, sir.

21 Q. And that was important work. Yes?

22 A. Yes, sir.

23 Q. And you predicated much of your career on that
24 important work of getting from prototype to commercial
25 product; correct?

1 A. Yes, sir.

2 Q. And as I think, you testified this morning, there
3 are always going to be changes from the prototype to
4 what becomes the final commercial product; correct?

5 A. Yes, sir.

6 Q. And what you testified this morning was that all
7 those changes in your experience are related to
8 manufacturing and cost-type decisions. Do you remember
9 that?

10 A. Yes, sir.

11 Q. The implication being that if there are changes
12 made they're not aesthetic reasons; they are for these
13 other reasons.

14 A. In my experience, yes, sir.

15 Q. And you're standing by that testimony?

16 A. Yes.

17 Q. You have in front of you --

18 MR. KRUMHOLZ: And your Honor, you also have in
19 front of you Mr. Carty's deposition.

20 Q. Do you see that in front of you?

21 A. I do.

22 Q. And you see that I took that deposition on
23 January 24th, about a month-and-a-half ago.

24 A. Yes, sir.

25 Q. And I asked you questions and you answered them.

1 A. Yes, sir.

2 Q. And you understood that you were under oath then
3 as you are under oath now.

4 A. Yes, sir.

5 Q. Can you go to page 107. And I'm going to start at
6 line 8 and read through the remainder of the page:

7 (Reading)

8 "Question: People within the company, you know,
9 using their game industry experience to, you know" --

10 MR. KRUMHOLZ: That's really embarrassing, as an
11 aside.

12 "-- improve the prototype to make it more
13 commercially viable?

14 "Answer: I believe I state that in number 6."

15 And there you're referring to your report;
16 correct? Are you with me?

17 A. I'm having trouble with the document.

18 Q. I'm sorry about that. So you see that there are
19 four pages per page?

20 A. Yes.

21 Q. Maybe not. So it's the one that's page 107.

22 A. Yes, sir.

23 Q. Now, I have to read my "you knows" all over again.

24 So starting at line 8:

25 "Question: People within the company, you know,

1 use their game industry experience to, you know,
2 improve the prototype to make it more commercially
3 viable?

4 "Answer: I believe I state that in number 6."

5 And there you're referring to your report;
6 correct?

7 A. Yes, sir.

8 Q. "Question: So I am correct?

9 "Answer: As I stated in number 6.

10 "Question: So the answer is yes, I'm correct?

11 "Answer: Yes."

12 And then I go on to ask the following question:
13 "And there will be some, and there would be aesthetic
14 changes and from the prototype to the commercial
15 version; correct?

16 "Answer: Almost all changes made are aesthetic
17 changes."

18 Did I read that correctly?

19 A. Yes, sir.

20 Q. So today under oath you tell the Court that all
21 changes are for cost and manufacturing reasons, but
22 just a month-and-a-half ago you said the exact
23 opposite, didn't you? You said almost all changes are
24 for aesthetic reasons; did you not?

25 A. I did.

1 Q. Because aesthetics matter; correct? The
2 aesthetics matter for a game?

3 A. Yes, sir.

4 Q. Because improving the aesthetics improves the
5 chances of the game becoming commercially successful.
6 Is that fair?

7 A. Yes, sir.

8 Q. And your job as a developer is to make the game as
9 likely to be as commercially successful as possible?

10 A. Yes, sir.

11 Q. And in fact, you personally, even as you've told
12 this Court that all changes are for cost reasons, you
13 personally have recommended aesthetic changes to
14 increase the game's chance of success from prototype to
15 commercial version; have you not?

16 A. I have recommended changes.

17 Q. Aesthetic changes?

18 A. Aesthetics are a matter of taste.

19 Q. Indeed. But you have recommended aesthetic
20 changes from prototype to commercial version to improve
21 the chance of success of that product; is that fair?

22 A. Yes, within the confines of the economics we were
23 dealing with.

24 Q. Right. There are always constraints on what you
25 can do based on cost, size of the board, all kinds of

1 other factors, but as you said in your deposition
2 almost all changes made from a prototype to a
3 commercial version are aesthetic changes; correct?

4 A. It is what I said.

5 Q. And The Game of Life is no exception; is it?

6 A. I would expect not.

7 Q. There are definite aesthetic changes between the
8 prototype and the early commercial versions that we
9 looked at, or at least one of which we looked at this
10 morning; right?

11 A. Yes.

12 Q. And in your view, it's correct that Milton
13 Bradley's development team used their own judgment to
14 make changes to the prototype that made the game more
15 commercially viable, that made the game more
16 aesthetically pleasing while still commercially viable;
17 isn't that correct?

18 A. I believe so.

19 Q. So let's touch on a few of these.

20 MR. KRUMHOLZ: Your Honor, can I approach.

21 THE COURT: Yes.

22 MR. KRUMHOLZ: Your Honor, I also will be with
23 this witness and Mr. Orbanes using demonstratives.

24 THE COURT: It would be good to give me a copy
25 and we can -- pass it up, two if you have them.

1 THE WITNESS: Thank you.

2 Q. What we have up on the board can be found at
3 page 7 of the demonstratives. It's pages from two
4 exhibits that have been entered, JTX509 and HTX14.

5 Do you recognize the black-and-whites as photos
6 from the prototype and the color one in the right-hand
7 corner image from a version, commercial version with a
8 1960 copyright?

9 A. Yes, sir.

10 Q. And I'm just going to highlight a few of these
11 aesthetic changes, but the mountains, there are
12 mountains in the prototype; correct?

13 A. Yes, sir.

14 Q. And the mountains are handled differently in the
15 early commercial version; are they not?

16 A. Yes, sir.

17 Q. Rather than being free-standing, Milton Bradley
18 decided to change that look to put them, integrate them
19 into the path; correct?

20 A. Yes, sir.

21 Q. And that's the kind of decision that developers
22 make when trying to decide whether and how a commercial
23 product should look. Agreed?

24 A. Yes.

25 Q. Okay. And in the early commercial version, that

1 1960 copyright, you see that white bridge?

2 A. Yes.

3 Q. And do you see the blue underneath it? If you
4 look on --

5 A. Yes.

6 Q. Do you see it?

7 A. Yes.

8 Q. Okay. And so we're clear, there's a white raised
9 bridge not too far from the spinner. Do you see that?
10 Right? And then it's got that blue under it, which is
11 representing a river; correct?

12 A. Yes, sir.

13 Q. That's an aesthetic choice; is it not?

14 A. Yes, sir.

15 Q. Which we don't see in the prototype; correct?

16 A. Correct.

17 Q. And in fact, you believe that it was an aesthetic
18 improvement to replace some of the buildings in the
19 prototype with that river and bridge in the commercial
20 version; correct?

21 A. Probably.

22 Q. Now --

23 A. I wasn't there.

24 Q. You are of the view that it is an aesthetic
25 improvement to replace some of the buildings in the

1 prototype with that river and bridge; are you not?

2 A. It's a change the Milton Bradley staff decided to
3 make. Does it look better? If you like bridges.

4 MR. KRUMHOLZ: I seemed to have lost my
5 deposition transcript.

6 (Discussion off the record)

7 Q. So you were of the view, though, that Milton
8 Bradley had decided that it would be more aesthetically
9 pleasing to have that bridge and river; did you not?

10 A. I don't remember what I said in the deposition. I
11 know that we went round and round about the aesthetics
12 and the word "aesthetics" because, you know, as we went
13 back and forth on this, they appeared to keep the same
14 volume of mountains but in trying to keep the 3-D feel
15 they removed things that would break, but it's their
16 decision to change that. I can't say why.

17 Q. Let's see what you did say. Would you go to
18 page 246. Are you there?

19 A. I am.

20 Q. On line 8:

21 "Question: So instead of putting more
22 buildings, for instance, they decided it would be more
23 aesthetically pleasing to have the bridge and river?
24 That's a fair conclusion; is it not?

25 "Answer: I expect so."

1 Right?

2 A. Yes.

3 Q. Because they want to keep 3-D images, but they
4 made different choices on what they thought was more
5 aesthetically pleasing; correct? Yes or no.

6 A. They made different choices for aesthetics and for
7 cost.

8 Q. Right. Okay. So we're in agreement, they made
9 different aesthetic choices within the constraints that
10 they had for costs. Agreed?

11 A. Yes.

12 Q. So in doing the analysis that you did, did you
13 understand that there's a difference between ideas and
14 expression?

15 A. Yes.

16 Q. And you understand that when you're doing this
17 analysis you're supposed to be looking at whether or
18 not there's been expressions of ideas that carry over
19 versus the ideas themselves; right?

20 A. Yes.

21 Q. So an idea would be, Hey, let's have 3-D
22 structures; correct?

23 A. Yes.

24 Q. But expression would be how you place them on the
25 board; correct?

1 A. Can be.

2 Q. So did you hear Ms. Ross talk earlier today about
3 how she thought that the structures in the prototype
4 were bigger than the structures in the commercial
5 version she looked at?

6 A. I do.

7 Q. That would be an example of expressing the 3-D
8 idea differently; correct?

9 A. Yes.

10 Q. And if you decide to put buildings in different
11 places or less of them or different colors, those are
12 all different expressions of the same 3-D idea;
13 correct?

14 A. Yes.

15 Q. Similarly with spinners, you talked about spinners
16 this morning. Do you remember that?

17 A. Yes.

18 Q. You're not telling this Court that the mere idea
19 of using a spinner is something that's relevant to this
20 derivative analysis; are you?

21 A. No.

22 Q. So we have to look to see if the spinners are the
23 same or different, not for mere presence.

24 A. Yes.

25 Q. And did you do that?

1 A. As much as I could with what's there.

2 Q. Well, yeah, this is a hard analysis, right,
3 because you can't see the prototype very well.

4 A. No.

5 Q. You can't, for instance, see if the text on the
6 payouts are the same or different; correct?

7 A. Correct.

8 Q. And of course, that's a big issue with deciding
9 whether or not the works are the same or derivative or
10 independent of; right?

11 A. Yes.

12 Q. Okay. But the spinner itself is different, is it
13 not? I mean doesn't it even just functionally work
14 differently?

15 A. I really can't say for sure because --

16 Q. Well, can you not see that in the early commercial
17 version the whole thing spins, numbers included, but in
18 the prototype the only thing that appears to be
19 spinning excludes the numbers?

20 A. I'm not positive on that.

21 Q. Well, we're all working with what we got. That's
22 what appears to be the case; right?

23 A. No. It could be either way.

24 Q. So you can't tell us whether it's the same
25 expression or not because you can't see enough --

1 A. I cannot tell if they are identical.

2 Q. But you can't tell whether they're the, the
3 spinners are the same expression or not because you
4 can't tell well enough what the differences may be or
5 may not be; correct?

6 A. Yes, sir.

7 Q. And surely you're not telling us -- you talked
8 about collecting money or collecting resources this
9 morning as an overlapping concept; do you recall that?

10 A. Yes.

11 Q. Surely you're not telling us that the mere
12 decision to collect a resource is reflective of whether
13 a work is the same or derivative for copyright
14 purposes; right?

15 A. I wouldn't be able to make that determination.

16 Q. You understand that collecting resources is a
17 concept; it's an idea.

18 A. Yes, sir.

19 Q. Catan collects resources.

20 A. Yes.

21 Q. You're not saying that Catan collecting resources
22 is the same thing as the prototype where people were
23 collecting money; are you?

24 A. No.

25 Q. Even though it's a shared idea, it's expressed

1 differently; correct?

2 A. Yes.

3 MR. KRUMHOLZ: Your Honor, I'd like to admit
4 HTX19, which is a board game with a 2015 copyright.

5 THE COURT: Is there any objection to -- this is
6 not yet a full exhibit or is it?

7 MR. KRUMHOLZ: It is not an exhibit at all at
8 this moment. It's not in the record.

9 THE COURT: So is there any objection to it?

10 MR. POLLARO: Not currently. There was a
11 previous version, a similar version that we looked at
12 before so I don't know if it's the same, so I didn't
13 have an objection to that one. So if that's the one,
14 I'm okay with it. If it's a new one, I might have a
15 problem.

16 MR. KRUMHOLZ: I have no reason to believe it's
17 any different.

18 MR. POLLARO: Then I have no objection.

19 THE COURT: Okay. So --

20 Mr. POLLARO: Actually, your Honor, could I take
21 a quick peek at it just to make sure.

22 THE COURT: Sure.

23 MR. POLLARO: No objection, your Honor.

24 MR. KRUMHOLZ: So I'd actually like to admit two
25 exhibits, your Honor, HTX19, which is a version of The

1 Game of Life with a 2015 copyright, and HTX102, which
2 is a Despicable Me version of The Game of Life.

3 THE COURT: Very well. So HTX15 and 102 will be
4 full without objection.

5 MR. KRUMHOLZ: HTX19.

6 THE COURT: 19. I'm sorry.

7 (Defendant's Exhibit HTX19 was admitted in full)

8 (Defendant's Exhibit HTX102 was admitted in
9 full)

10 MR. KRUMHOLZ: May I approach.

11 THE COURT: Yes.

12 Q. What I've just put up on the board can be found at
13 Slide 12 of the packet of demonstratives, and I will
14 represent that it is the board game from HTX19, which
15 is what we just entered, as well as the board game from
16 the prototype, which is JTX509.

17 You've looked at that board game before.

18 A. Yes, sir, I have.

19 Q. You've looked at that game board before; correct?

20 A. Yes, sir.

21 Q. And you would agree that the expressions, that the
22 looks and the imagery in the new game are different
23 than the looks and the imagery in the prototype;
24 correct?

25 A. Yes, sir.

1 MR. KRUMHOLZ: May I approach.

2 THE COURT: Yes.

3 Q. So I just put up on the board what is on page 14
4 of the demonstratives, which are images and the
5 prototype and HTX102, which we've just admitted, which
6 is the Despicable Me version of The Game of Life.

7 And, same question, you would agree that the
8 looks and the imagery used for Despicable Me, for the
9 board of Despicable Me is different than the looks and
10 the imagery used for the board for the prototype;
11 correct?

12 A. Yes, sir.

13 Q. The only thing that overlaps with any of the
14 versions is some concepts that you believe carry
15 through; is that fair?

16 A. Yes.

17 Q. So you were asked some questions with regard to
18 the assignment agreement. Do you recall that?

19 A. Yes, sir.

20 Q. And you offered an opinion with respect to whether
21 or not it was consistent with your experience, your
22 present experience; correct?

23 A. Yes, sir.

24 Q. But your present experience, as you testified to
25 this morning, concerns deals between game companies and

1 designers; correct?

2 A. Yes.

3 Q. But that's not what the assignment agreement is.
4 It's not a deal between a game company and a designer;
5 is it?

6 A. No; it's between the designer and his agent.

7 Q. You in fact have never seen, you don't recall ever
8 having seen an agreement in your experience similar to
9 the assignment agreement; isn't that right?

10 A. No. I've seen a few, a couple, not quite like
11 that, though. Nothing identical to that, certainly.

12 Q. Can you go to page 92 from your deposition,
13 please.

14 A. What page?

15 Q. 92.

16 A. Okay.

17 Q. Starting at line 8:

18 "Question: You've been handed what has been
19 marked as Exhibit 6, which is entitled 'Assignment
20 Agreement.' Have you seen that document before?

21 "Answer: I have.

22 "Question: Have you in your game industry
23 experience ever seen an agreement of that nature
24 before?

25 "Answer: I don't recall.

1 "Question: So sitting here today, you can't
2 think of any such documents?

3 "Answer: I don't recall."

4 I read that correctly?

5 A. You did.

6 Q. And that was just a month-and-a-half ago.

7 A. Yes, sir.

8 Q. In fact, you are not personally aware of any
9 instances in your career where a person has presented
10 an idea to someone to create a prototype as has been
11 alleged in this case; have you?

12 A. We assigned --

13 Q. You understand what's been alleged in this case is
14 that Mr. Klammer came up with the idea and asked
15 Mr. Markham and his team to create a prototype. You
16 understand that; correct?

17 A. Yes, sir.

18 Q. You are not aware, you have no experience with
19 that kind of situation in your --

20 A. Not at that level.

21 Q. So let's just be clear on the record. In your --
22 how many years, 30?

23 A. Thirty-three.

24 Q. In your 33 years, that's just not something that
25 you've had to deal with, dealing with a situation where

1 somebody came up with an idea and asked somebody else
2 to build a prototype for them. Fair? Fair?

3 A. If I could explain?

4 Q. I just want to know if you have or you have not
5 had that experience before.

6 A. Not that exact experience, no.

7 Q. Okay. So you also offered some opinions with
8 regard to how long it takes to create a prototype;
9 correct?

10 A. Yes, sir.

11 Q. Now, you have no experience as a designer; right?

12 A. No.

13 Q. You've never designed a game yourself.

14 A. No, sir.

15 Q. You've never created a prototype.

16 A. No, sir.

17 Q. You've never been an inventor.

18 A. No, sir.

19 Q. You've never licensed anything to a third party.

20 A. No.

21 Q. So you don't have any personal experience of how
22 long it actually takes to create a prototype; correct?

23 A. I have not personally created a prototype.

24 Q. And you don't know whether two people working
25 full-time in close quarters could have created this

1 prototype in six weeks? You're not in a position to
2 say that one way or the other; are you?

3 A. I am not.

4 Q. You don't know how much time they put into it?

5 A. No. Sir.

6 Q. You don't know what kind of time pressures they
7 were under.

8 A. No, sir.

9 Q. And certainly in your experience when people are
10 under tighter time pressures they tend to work faster.

11 A. Sometimes.

12 MR. KRUMHOLZ: I have nothing further, your
13 Honor.

14 THE COURT: Thank you.

15 Mr. Pollaro, redirect.

16 MR. POLLARO: Thank you, your Honor.

17 REDIRECT EXAMINATION BY MR. POLLARO:

18 Q. Mr. Carty, would you call any change that you can
19 see an aesthetic change?

20 A. I don't really know if they're aesthetic or not.
21 I know that we made changes like this on a regular
22 basis. Some of it was based on manufacturing
23 constraints, a lot of it was based on cost.

24 Q. And if you could see the change, it was aesthetic?
25 I mean, how else would you know if there was a change

1 if you couldn't see it; correct?

2 A. People make changes based on their personal
3 tastes. I can't say for sure why they make a change.

4 Q. Are you aware of any evidence in this case that
5 the changes made from the prototype to the commercial
6 version were made for monetary considerations?

7 MR. KRUMHOLZ: Objection. Foundation.

8 THE COURT: Was that an objection?

9 MR. KRUMHOLZ: Yes. I'm sorry.

10 THE COURT: Overruled.

11 A. There's a letter from Mr. Markham to Milton
12 Bradley talking about changes to be made to the game to
13 assist the manufacturing. I don't remember the
14 document number at all, but --

15 Q. I appreciate that, Mr. Carty, but my question was
16 evidence related to changes that were made for an
17 economic reason. In other words, have you seen any
18 evidence one way or the other that Milton Bradley was
19 making changes for an aesthetic reason or for a
20 monetary reason?

21 A. No, sir.

22 Q. Does "aesthetic" mean to you "creative"?

23 A. No.

24 Q. Are these the types of changes that we've been
25 talking about with some of these exhibits? I think I

1 heard you say that these are changes that you would
2 have done when you worked at Mayfair Games as you were
3 commercializing a prototype; is that correct?

4 A. I view most of these change when they're marrying
5 two different IPs and making changes to go to
6 production to be logical and normal.

7 Q. And you made those, you have experience making
8 those changes in your experience?

9 A. Yes, sir, I do make many of those changes.

10 Q. And did you receive design credit when you made
11 those changes?

12 A. No, sir, I did not.

13 Q. Did you expect design credit when you made those
14 changes?

15 A. No, I did not.

16 Q. Let's look at some of the --

17 MR. POLLARO: May I approach.

18 THE COURT: Yes. You need to get a microphone
19 if you want to inquire from there.

20 Q. Mr. Carty, do you recall a little while ago you
21 were asked questions about the 1960 version of the game
22 bearing a copyright of 1960, which is on the bottom
23 right, versus two images of the prototype?

24 A. Yes, sir.

25 Q. And you were asked about some simplifications that

1 were made to the prototype during commercialization.

2 Do you remember that?

3 MR. KRUMHOLZ: Objection to the form.

4 THE COURT: Well, I think we're just getting
5 oriented right now so I'll overrule that, see what --

6 Q. Do you recall discussing, for example, the height
7 of the mountains?

8 A. Yes, sir.

9 Q. Do you consider the height of the mountains to be
10 a creative design choice?

11 A. No, sir.

12 Q. Would you consider the removal of a transmission
13 tower to be a creative design choice?

14 A. No, sir. I would expect that's economic.

15 Q. Would you consider the removal of a 3-D overpass
16 to make it 2-D to be a creative design choice?

17 A. I would have removed it.

18 Q. And can you tell us why you would have removed it?

19 A. Because they would get broken and then you'd have
20 returns and that costs money.

21 Q. Do you see any similarities between the prototype
22 and the 1960 edition of The Game of Life?

23 A. I see many similarities.

24 Q. Can you tell us those similarities.

25 MR. KRUMHOLZ: Your Honor, beyond the scope of

1 cross, your Honor.

2 THE COURT: I'm going to sustain that. This is
3 beyond the scope.

4 Q. Do you see any other differences to the, between
5 the prototype and the 1960 edition of the game that we
6 haven't discussed, for example, the height of the
7 mountains, the addition of a river, the removal of the
8 3-D overpass? Can you identify any other changes
9 between the prototype and the commercial version of the
10 game?

11 A. Well, they changed the number of buildings. They
12 seemed to try to keep the same amount of volume in the
13 mountains and the raised areas. In the analysis
14 process, a cut of all the little squares and they're
15 almost identical, all the little movement squares. The
16 board or the style of art on the board is extremely
17 similar; whether it's same color I couldn't tell you.
18 The reduction in height on the mountains might have
19 been done so it would fit in a more standard-sized box,
20 but there's no way I could speak to that for sure.

21 Q. And again, in your experience, do these changes
22 that were made for the commercialization process rise
23 to the level of creative?

24 A. Not in my viewpoint, sir.

25 Q. And would this be something you would expect to

1 occur between a prototype and a commercialization?

2 A. Yes, sir, I would.

3 Q. And in your experience would you expect that the
4 individual that made these changes would expect to be
5 considered a designer or design credit for those
6 changes?

7 MR. KRUMHOLZ: Objection.

8 THE COURT: Sustained.

9 MR. POLLARO: May I approach, your Honor.

10 THE COURT: Yes.

11 Q. Do you see -- again, you were looking at this
12 image just a little bit ago, two images of the
13 prototype on the left, the current version of The Game
14 of Life on the right. Do you see those?

15 A. Yes, sir, I do.

16 Q. Do you see expressions between the prototype that
17 are contained in the commercial version of the game?

18 MR. KRUMHOLZ: Objection, your Honor. Again,
19 beyond the scope of the cross.

20 THE COURT: Well, you did have him take a look
21 at comparison of the two; right?

22 MR. KRUMHOLZ: I did. He testified to what
23 similarities he purported to see on direct. I asked
24 him about differences and now he wants to re-engage on
25 similarities, which I didn't address on cross, and they

1 had the opportunity to ask them that.

2 THE COURT: Well, all right, so that's probably
3 technically true. I mean he didn't ask about
4 similarities, he asked about differences; and now
5 you're going back through --

6 MR. POLLARO: Then he asked about the overall
7 concept and feel and if it was similar, and I had the
8 same reaction you did. That's why I'm asking these
9 questions.

10 THE COURT: I'll go ahead and allow it. He did
11 testify that the looks and the imagery are different,
12 and I'll give you some leeway on this. He did talk
13 about the spinner, so go ahead.

14 MR. POLLARO: Thank you, your Honor.

15 Q. Mr. Carty, can you identify for the Court the
16 similarities that you see between the prototype and the
17 current version of the game.

18 A. Well, the spinner. They both have basically the
19 same style winding track. They have the similar style
20 play money. The current version has removed almost all
21 the 3-D elements of the game. I would have to say,
22 though, if this was ever presented to me as a separate
23 product I would have to reject it.

24 MR. KRUMHOLZ: Your Honor, we're now moving into
25 if it was presented to him.

1 THE WITNESS: I'm sorry.

2 THE COURT: Well, I think he's ended his answer,
3 so go ahead.

4 MR. POLLARO: Thank you, your Honor.

5 Q. And Mr. Carty, just so we're clear on your answer,
6 you were talking about the expressions that you see in
7 the current version of the game; correct, not concepts?
8 You see an expression of a spinner; correct?

9 MR. KRUMHOLZ: Objection. Leading question.

10 THE COURT: Overruled. Go ahead.

11 A. Yes, sir.

12 Q. And I believe your testimony before that you made
13 or you reviewed the rules for each of the versions, the
14 prototype and the current version of the game; is that
15 correct?

16 A. Yes, sir, I did.

17 Q. Was it your testimony or can you tell me what you
18 thought as you compared the rules of the prototype
19 versus the current version of the game?

20 A. Their presentation is very different. The overall
21 goal and the texture is the same.

22 Q. Would you expect that a company other than Hasbro
23 produced the current version of the game would likely
24 have a copyright violation allegation with respect to
25 the original Game of Life copyright?

1 MR. KRUMHOLZ: Objection.

2 THE COURT: Sustained.

3 Q. Mr. Carty, you were asked questions about when you
4 entered the game industry. Do you recall that?

5 A. Yes, sir.

6 Q. And that would have been roughly 33 years ago; is
7 that --

8 A. Yes, sir.

9 Q. When you entered the game industry, did you learn
10 the trade from individuals that were in the industry at
11 the time that you entered?

12 A. Yes, sir.

13 Q. And did you ask questions, did you gain
14 information, can you tell us a little bit more about
15 your, how your knowledge base grew as you entered the
16 industry.

17 A. I sat with, I talked with, I met with a large --
18 well, everybody I do business with. And I met a lot of
19 designers, developers, and people that worked at
20 different game companies and talked to them about
21 processes and procedures, printing, problems for making
22 product, prototypes, mold-making problems, print color
23 issues. I've always had an interest in process, in
24 manufacturing. I actually visit factories on vacation,
25 which is a crazy thing but that's all part and parcel

1 of that. You want to know how it works; and if you
2 know how it works, you do a better job. In my opinion,
3 I can do a much better job at picking product, at
4 developing systems that would get product to retail in
5 the proper manners and make everybody more money.

6 Q. Now, would you say that even though you started in
7 the industry yourself in the mid-80s that your
8 understanding of the industry starts in the mid-80s or
9 does it predate that?

10 A. I heard a lot of stories and I can't tell you that
11 they were all true, but I've heard a lot of stories
12 from different people over the years, especially in the
13 beginning when there were a lot of the older guys and
14 ladies were still around, so I have an inkling of what
15 went on, a pretty good one. I made models, did model
16 railroading and did balsawood models and plastic models
17 as a kid and actually into my teens so I know how long
18 it takes to make a lot of different things from
19 scratch. I've had the experience, and experience it
20 was, working with typeset machines, so --

21 MR. KRUMHOLZ: Your Honor, I feel like we
22 strayed along with the question.

23 THE WITNESS: I'm sorry.

24 MR. KRUMHOLZ: Balsa models he made as a kid.

25 THE COURT: Right. Well, you don't have to

1 apologize. He has a job to do to object and you don't
2 need to apologize for anything you're answering.

3 THE WITNESS: Yes, your Honor.

4 THE COURT: All right. But he wasn't finished
5 with his answer. So I'm going to overrule the
6 objection. I want him to finish his answer and then
7 you may want to move to strike.

8 Go ahead.

9 Q. Were you finished with your answer, Mr. Carty?

10 A. More or less. I visited both FASA Corporation,
11 Mayfair Games in the very early 80s after I started
12 work in the industry, and they were both using typeset
13 machines and had to lay out all the pages by hand.
14 That's a very time-consuming function. That was the
15 end of my answer.

16 Q. Okay. I'm just trying to get a sense, if you
17 could inform the Court on basically the foundation of
18 your experience. Even though you came into the
19 industry yourself in the early 80s, it sounds like you
20 spoke to people that were present in the industry.

21 A. I did.

22 Q. Okay. And while you can't pinpoint a precise date
23 as far back as the information went, it certainly
24 predates your entry into the market. Is that fair?

25 A. Yes, sir.

1 Q. Okay.

2 MR. POLLARO: I have no further questions, your
3 Honor.

4 THE COURT: All right. Thank you. Any recross?

5 MR. KRUMHOLZ: No, your Honor.

6 THE COURT: All right.

7 I've neglected to ask all the other assemblage
8 of attorneys whether anyone has any other questions,
9 but I take it nobody does.

10 Is that correct?

11 MS. VAN LOON: Correct, your Honor.

12 MR. JINKINS: Correct, your Honor.

13 THE COURT: All right. Very good.

14 Then your testimony is complete, Mr. Carty. You
15 may step down.

16 MR. KRUMHOLZ: Should we go straight into
17 Mr. Orbanes?

18 THE COURT: Well, I want to know, first of all,
19 if the Plaintiff is resting.

20 MR. POLLARO: We have no other witnesses, your
21 Honor. We are resting.

22 THE COURT: Plaintiff rests.

23 MR. POLLARO: Your Honor, just one quick point.
24 Sorry. We haven't addressed the issue of the
25 deposition transcripts with the other parties as far as

1 how we're going to give them to you. Obviously, we've
2 designated, we've done all that, but we haven't got --

3 THE COURT: We can go off the record for a
4 minute.

5 (Discussion off the record)

6 THE COURT: We'll go back on the record, and so
7 subject to the submission of deposition designations
8 and cross-designations, the Plaintiff is resting. Is
9 that correct, Mr. Pollaro?

10 MR. POLLARO: Yes, your Honor. I guess the only
11 other point is we maintain the objection about the late
12 addition of the defense, and so in California you said
13 make that objection before we rest so I'm just
14 following up on that.

15 THE COURT: What is the objection on?

16 MR. POLLARO: We objected to the addition of the
17 defense. We had motions about the defense about the
18 work-for-hire for Bill Markham and we had briefing on
19 that, and I made the objection in California and you
20 said, well, it's premature; you haven't rested yet,
21 make the objection before you rest. And so I just want
22 to make sure I do that before I rest.

23 THE COURT: All right. So you've made it.

24 MR. POLLARO: Thank you, your Honor.

25 MR. KRUMHOLZ: So your Honor, just to get my

1 directed verdict motion on the record.

2 THE COURT: Yes, do that.

3 MR. KRUMHOLZ: So in our view, we believe that
4 the undisputed evidence shows that the only authors of
5 the subject works were Ms. Chambers and Mr. Israel, and
6 there's no evidence that Mr. Markham was in any way an
7 author, so the only basis he could potentially have to
8 claim that he owned a copyright that was transferred
9 would be through a work-for-hire scenario. We believe
10 there's two deficiencies with that. One, as a matter
11 of law if it was a work-for-hire scenario the
12 termination provision Section 304(c) does not apply.

13 Also that they have not shown factually that any
14 work done by Ms. Chambers or Mr. Israel was done for
15 Mr. Markham personally, as opposed to a company, and
16 the only evidence in the record is that they were
17 working for a company, and there's no affirmative
18 evidence that Mr. Markham himself personally ever
19 applied the rights of that company. So factually we do
20 not believe they have been able to establish that he
21 ever owned anything by way of copyright that he could
22 transfer.

23 We also believe that they have failed the Best
24 Evidence Rule to identify what materials were actually
25 the subject of the registration. They had a duty under

1 that rule to make reasonable efforts to search for
2 those records. There's nothing in the record to
3 suggest that they did any such thing. They have not
4 put forth any evidence that they ever tried to even
5 request those reports from the copyright office, which
6 is their minimum duty under Best Evidence Rules, so we
7 believe the evidence fails for that reason as well.

8 In addition, we believe that the undisputed
9 evidence shows that any work that was done was done on
10 behalf of Mr. Klamer on a work-for-hire-basis and that
11 the only evidence that has been adduced supports the
12 instance and expense test in establishing that any work
13 was done at Mr. Klamer's instance and at his expense,
14 and for that reason as well 304(c) does not apply
15 because again It does not apply to work-for-hire
16 scenarios.

17 THE COURT: Thank you. Rather than have you
18 oppose this -- you want to --

19 MS. VAN LOON: I just want to join in the
20 directed verdict.

21 MR. JINKINS: For the record, we'd like to join
22 in, too.

23 THE COURT: Very well. So I'm going to take all
24 those motions under -- I'm going to reserve on them and
25 we can move directly to presentation of your evidence.

1 MR. KRUMHOLZ: Thank you, your Honor. Couple
2 minutes to move our boxes over.

3 THE COURT: Sure. Let's just take five minutes
4 to give you a chance to set up.

5 (Recess)

6 MR. KRUMHOLZ: Your Honor, I neglected to add
7 just for the record on a motion for directed verdict
8 they had sought declaratory judgment on derivatives as
9 well, and I just want to make sure that's included in
10 our motion. We don't believe they've shown failure to
11 do the proper test and failure to identify actual
12 expressions that they have met their burden on their
13 claim for derivative works declaratory judgment.

14 THE COURT: Okay. Thank you.

15 All right. Let's call your witness.

16 MR. KRUMHOLZ: Mr. Orbanes.

17 I'm assuming you guys want to join in on that
18 portion of the motion as well?

19 MS. VAN LOON: Yes, we do.

20 MR. JINKINS: Yes, your Honor.

21 THE COURT: All right. Thank you.

22 PHILIP EDWARD ORBANES, DEFENSE WITNESS, SWORN

23 THE CLERK: Please state your name for the
24 record and spell your last name.

25 THE WITNESS: Philip Edward Orbanes, spelled

1 O-R-B-A-N-E-S.

2 THE COURT: Good afternoon, Mr. Orbanes.

3 THE WITNESS: Thank you, your Honor.

4 THE COURT: You may inquire, Mr. Krumholz.

5 MR. KRUMHOLZ: Thank you.

6 DIRECT EXAMINATION BY MR. KRUMHOLZ:

7 Q. Good afternoon.

8 A. Good afternoon.

9 Q. Mr. Orbanes, I want to start by talking about your
10 background and experience. Let's start with your
11 educational background. Would you explain to the Court
12 where you went to college and what you studied and when
13 you went.

14 A. Certainly. I went to the Case Institute of
15 Technology in Cleveland, Ohio, between the years 1965
16 and 1969.

17 Q. What did you study there?

18 A. I studied a subject that was -- or a major that
19 was entitled Organizational Science.

20 Q. What is Organizational Science?

21 A. It was business management with a very strong
22 science and engineering background.

23 I think maybe I should just get a little water
24 here.

25 Q. Yes, of course.

1 MR. KRUMHOLZ: Your Honor, while he's doing
2 that, you have a binder that we're going to be using
3 with this witness. Inside the flap is a CV for
4 Mr. Orbanes. Some judges would like to receive the CV;
5 some would not. So it's been premarked as HTX101.
6 We'll offer it for admission if the Court would find it
7 helpful.

8 THE COURT: I'm sorry, where is this?

9 MR. KRUMHOLZ: It's HTX101.

10 THE COURT: What tab would that be? Oh, it's
11 inside?

12 MR. KRUMHOLZ: That one is inside the flap.

13 THE COURT: This is marked as an Exhibit HTX101?

14 MR. KRUMHOLZ: Yes.

15 THE COURT: Yes, I would like to have it
16 admitted.

17 MR. KRUMHOLZ: My apologies. We did not give
18 them a binder. They'll need it for everything else.
19 Sorry about that. I'm sorry, your Honor.

20 THE COURT: So this will be a full exhibit. I
21 take it there's no objection; is that correct?

22 MR. POLLARO: No, sir.

23 THE COURT: Okay.

24 (Defendant's Exhibit HTX101 was admitted in
25 full)

1 THE COURT: Go ahead.

2 MR. KRUMHOLZ: Can I ask logistics; when we have
3 a break do you want me to bring up all the exhibits,
4 copies for you?

5 THE COURT: Yes, that would be fine.

6 MR. KRUMHOLZ: Okay.

7 Q. So let's talk about your board game industry
8 experience. I take it you have worked in the board
9 game industry; correct?

10 A. My entire career.

11 Q. And for how many years have you been in the board
12 game industry?

13 A. Professionally since 1965, so that would be
14 53 years.

15 Q. When did you -- well, let me ask it differently.

16 How old were you when you came up with your
17 first game?

18 A. I was nine years old.

19 Q. And what did you come up with at that time?

20 A. I had just learned Monopoly and I very was
21 fascinated by it, so I invented my own game that was
22 based on mineral exploration that was similar in
23 nature.

24 Q. All right. And when did you come up with your
25 next game after that?

1 A. I came up with games continually after that; and
2 in 1962 I self-published one of my games and made 50
3 copies on a Spirit duplicator and sold these to
4 play-by-mail players, which was a special type of hobby
5 game back then.

6 Q. All right. So what year was that?

7 A. 1962.

8 Q. And so by that point, you had sold -- you had at
9 least made some money off your first game?

10 A. Yes.

11 Q. What was the first company that you were involved
12 with?

13 A. In 1965, after I graduated high school, I
14 incorporated a business that was named Game Science
15 Corporation.

16 Q. And did you develop any products in connection
17 with that game?

18 A. Yes. The first game that I published, which was
19 my invention, was an educational game about the Vietnam
20 War, and it showed just how difficult it would be to
21 win that war.

22 Q. So you were right, apparently.

23 A. Apparently. Sadly.

24 Q. So did you sell that game?

25 A. Yes, I did.

1 Q. All right. Can you turn to Tab 8 in your binder,
2 which is a document that has not yet been admitted.
3 It's HTX -- it's premarked as HTX104. And can you tell
4 us what we're looking at in those images.

5 A. Yes. This is me at the Game Science booth at my
6 first trade show when I was a junior in college. It
7 took place at the Drake Hotel in Chicago, Illinois, and
8 this was the annual hobby show. The games that I was
9 marketing were known as "hobby games" back then.

10 Q. And this was -- so you were at this game show in
11 1968 selling product?

12 A. Right. And I'm introducing my new game at that
13 show, featuring it, called The Battle of Britain.

14 Q. There's a reference to Tom Shaw. We'll talk more
15 about him later, but who is he and what significance
16 does he have to your career?

17 A. He was my mentor. Tom Shaw was the chief
18 executive at the Avalon Hill Game Company that
19 Mr. Carty mentioned from 1958 through 1977; and when I
20 did that early game in 1962 and submitted it to him, he
21 thought I had a lot of potential and for a variety of
22 reasons he helped me. And so he gave me the background
23 of how the game industry worked, what inventor
24 contracts were, he even sent me a blank Avalon Hill
25 contract so that I would be familiar with it.

1 Q. Okay. And I guess for the sake of completeness,
2 who is Hugh O'Brian?

3 A. Hugh O'Brian was a very famous television star.
4 He was appearing at that trade show endorsing
5 somebody's product line at the end of my aisle, and he
6 was the first celebrity I ever saw in person.

7 Q. So I take it you were impressed.

8 A. I was very. He was a big guy.

9 MR. KRUMHOLZ: Your Honor, we'd move to admit
10 HTX104.

11 THE COURT: Any objection?

12 MR. POLLARO: No objection, your Honor.

13 THE COURT: All right. 104 will be full.

14 (Defendant's Exhibit HTX104 was admitted in
15 full)

16 Q. So what eventually happened to Game Science?

17 A. At this trade show, the very first trade show that
18 I went to, I was approached by a man named Lou Wetzel,
19 who was the president of what became known as the
20 Learning Aids Group, and Mr. Wetzel explained to me
21 that his company was in the process of acquiring a
22 number of small companies that had an educational
23 content to their product line and he liked what he saw
24 in Game Science and would I be interested in selling
25 the firm to him. The following month was the New York

1 Toy Fair, and at that Toy Fair we consummated the deal.

2 Q. Okay. So you sold your first game company to
3 Learning Aids?

4 A. It became the Learning Aids Group.

5 Q. Okay. And that was what year?

6 A. 1968, the following month from this trade show.

7 Q. So did you go to work for Learning Aids?

8 A. Yes. As soon as we had consummated the deal, I
9 went to work developing a product line for them, and
10 the following June when I finished at Case I moved to
11 New York with my wife and went to work for them
12 full-time.

13 Q. So you answered this in part, but what did you do
14 for them?

15 A. I ran product development for the Game Science
16 Division.

17 Q. What kind of products?

18 A. The primary products were family games, but the
19 very first significant project that I did after I
20 arrived in New York City was actually an astrological
21 home computer.

22 Q. Okay. And I think we'll probably talk more about
23 that later in your testimony, but let's continue
24 through your background.

25 How long were you at Learning Aids?

1 A. Until 1971 when the firm ran into financial
2 trouble and they had to sell off their assets. At that
3 point this particular product whose name was
4 Aquarius 2000 was very successful and it was acquired
5 along with me.

6 Q. So Aquarius 2000 was the game that you developed?

7 A. Yes, invented and developed.

8 Q. And it was invented and developed, is that what
9 you said?

10 A. Yes.

11 Q. And it was a commercially successful product and
12 ultimately got sold to another company?

13 A. Right. It got sold to a company called Reese
14 Sales Associates, and they were the nation's leading
15 sales representative company to the department store
16 and gift market. The Learning Aids Group did not have
17 that capability so they had contracted with Reese to
18 reach this marketplace.

19 Reese was very successful with it, and they
20 wanted me to come to work for them to help develop a
21 game and puzzle line that would be their own in-house
22 line.

23 Q. So what years were you at Reese?

24 A. I think I joined in the summer of 1971, and I was
25 there until probably the end of 1972.

1 Q. So again, I think you answered this a little bit
2 in part, but what were you doing at Reese?

3 A. Product development.

4 Q. For what kinds of products?

5 A. They were decorative adult puzzles and more
6 sophisticated games.

7 Q. And where from there? Where did you go after
8 Reese?

9 A. One of the other companies that Reese represented
10 was a small game company called Gamut of Games, and
11 Gamut of Games wanted to also expand its product line
12 and they hired me away from Reese Sales.

13 Q. And what did they -- what did you end up doing for
14 them?

15 A. My first position there was creative director,
16 which meant once again I was developing and getting
17 into manufacture a new product line. Eventually, I
18 became the vice-president of the firm and had a lot of
19 the business responsibilities as well.

20 Q. So what kinds of products were you involved with?

21 A. Family games.

22 Q. Family games?

23 A. Family board games.

24 Q. Family board games.

25 A. With plastics as well as with cardboard

1 components.

2 Q. So through this point you've been involved in
3 conceiving and designing and developing board games
4 starting when you were nine?

5 A. That's when I first became an inventor, if you
6 will, yeah.

7 Q. But starting in the industry in 1965.

8 A. On a professional basis, yes.

9 Q. So let's talk about your next job. So I think
10 we're in 1976 at this point.

11 A. Yes. Three years later I came to the attention of
12 the Ideal Toy Corporation, which at that point in time
13 was the nation's third largest toy and game company and
14 Ideal, which was the leading maker of action games.
15 They made games like Mousetrap. They pioneered the
16 category. They decided in 1976 that based on their
17 success in action games they wanted to get into family
18 board games, and they saw me as the talent that they
19 needed to help them to expand into this new category
20 for them.

21 Q. What was your position when you started there?

22 A. Initially I was manager of the Board Game Division
23 and, again, on an annual basis I would develop their
24 product line. I also began to work with inventors once
25 my boss realized that I knew what I was doing with

1 outside resources. And probably 12 to 18 months later
2 they decided that I should run both divisions so I was
3 made Director of Games.

4 Q. So how many years were you at Ideal?

5 A. Three years.

6 Q. And approximately how many games did you bring to
7 market at that time?

8 A. Oh, probably 75.

9 Q. And can you give us any examples of games that you
10 helped market.

11 A. Yes. Well, the first game that I developed for
12 the company was based on the TV game show Welcome Back
13 Cotter, and I was asked to invent the game and they
14 gave me two weeks to do it; but I knew the program, and
15 I had a real -- I knew how I wanted to do a
16 three-dimensional appearing game that looked like the
17 classroom, and once I had that, the game came pretty
18 quickly. And then I was responsible for actually
19 developing it, using the resources of the company.

20 Q. How quickly did that game come to you?

21 A. Pardon me?

22 Q. How quickly were you able to design, invent and
23 design --

24 A. Yeah. See, the problem was normally speaking in
25 the industry the cycle begins right after Toy Fair,

1 which means you start your product development
2 basically one year in advance. As Mr. Mr. Carty says,
3 most of the time it does take time to put together a
4 new game, but this license fell into the hands of Ideal
5 Toy in September and that's why there was a rush
6 because we had to have it at Toy Fair and shipping at
7 Toy Fair, which I believe back then was probably still
8 in March. Currently it's February, but it was in March
9 in those days. So, yeah, there was a real rush on it.

10 Q. And that was going from conception all the way to
11 commercial --

12 A. All that they gave me was here's a license, here's
13 a price point, do a game.

14 Q. So how fast did you turn it around?

15 A. Well, we had the game in production in February.

16 Q. And that was --

17 A. And I actually remember specifically in January
18 they sent me to California to meet with the licensor to
19 get approval for the graphics, which was fortunately
20 not an issue.

21 Q. So when you were at Ideal Toy for the development
22 of the games, were you working with people externally,
23 internally? What developers were you typically working
24 with?

25 A. Well, I found it to be a real relief to get to

1 Ideal Toy because the company had 80 people who did
2 product development, you know, graphic designers,
3 industrial designers, in-house inventors, model makers,
4 toolmakers, engineers. But the lifeblood of the
5 company was still inventions that came in from outside
6 inventors. And my boss, who was a pretty busy man,
7 realized soon after I joined the firm that I was
8 experienced and capable of making judgments on products
9 that were shown to us by outside inventors, so he began
10 to rely on me to meet with those who came in from out
11 of town and set up shop in Manhattan.

12 There was a lot of toy and game companies in the
13 New York area, Ideal was just one of them, and so it
14 behooved inventors to come there and present their
15 wares to all the companies in the area.

16 Q. So for this first segment of your career where you
17 worked at, you know, Game Science, Reese, Gamut, Ideal,
18 how frequently were you working with outside inventors
19 and designers?

20 A. Well, at all of these companies certainly on a
21 monthly basis, and it became more intense once I got to
22 Ideal. It might even be weekly then.

23 Q. Let's talk about your next position after Ideal,
24 so I think you said that took us to 1979. Where did
25 you go from there?

1 A. In 197, I came to the attention of Parker
2 Brothers. They needed someone to head up what they
3 called new product research. I always had the highest
4 regard for Parker Brothers. It was the nation's second
5 largest game company behind Milton Bradley; and unlike
6 Ideal Toy, which sold toys, dolls, hobbies and games,
7 Parker was pretty much a game company so for me it was
8 my dream job.

9 Q. What years were you there?

10 A. I started in February, right after Toy Fair of
11 1979 so that would have been late February.

12 Q. So you started in 1979 and you were there until?

13 A. 1990.

14 Q. So approximately 11 years.

15 A. Yes. Close to 12 years, whatever.

16 Q. What toys or I mean, sorry, what games were you
17 involved with during that time that we might have heard
18 of?

19 A. Well, every game that Parker Brothers made from
20 1979 to 1990 I touched in some way, be it licensed
21 products like Star Wars or the Six Million Dollar Man
22 or Strawberry Shortcake. Those games, by the way, were
23 invented by my staff based on the licenses that we
24 acquired. But I also worked extensively with outside
25 inventors and brought in, even from Japan, quite a

1 number of games that came into the product line.

2 Q. And when you say you worked with and you brought
3 in, can you elaborate a little bit on what you mean by
4 that.

5 A. Yeah, initially just as at Ideal Toy, I was
6 assisting my boss, Bill Doorman, but when Bill decided
7 to leave the company eventually I became the senior
8 vice-president of research and development I believe by
9 the spring of 1994, and then it became my full -- I had
10 the full weight of responsibility on my shoulders to
11 see every significant game inventor in the company and
12 selective countries around the world.

13 Q. So it was your ideal job.

14 A. Yes, it was.

15 Q. But you were only there until 1990.

16 A. Right.

17 Q. What happened?

18 A. Parker Brothers was owned for a long time by
19 General Mills, and General Mills had instilled a really
20 good sense of security in the company; however, for a
21 variety of reasons in 1985 I believe General Mills
22 decided to get out of the toy business. So they had by
23 this point built up a world-wide network of toy
24 companies, including Parker Brothers, and they put them
25 all together into a separate corporation that became

1 known as Kenner Parker Toys, and then they distributed
2 the stock in that company to the shareholders, which
3 meant that the vast majority of Kenner Parker stock was
4 in unfriendly hands.

5 Two years later we had been so successful that
6 we were engaged in a takeover battle, and eventually
7 the winner of that takeover battle was the Tonka
8 Corporation, which made metal trucks. Tonka,
9 unfortunately, was not well-managed and they overpaid
10 and they went bankrupt. And after they went bankrupt,
11 Hasbro bought Kenner Parker Tonka.

12 Q. So how did that impact you?

13 A. Hasbro already owned Milton Bradley, and they
14 didn't need to have two teams of senior management.

15 Q. So that's a long way of saying that Hasbro fired
16 you.

17 A. Yes.

18 Q. Any hard feelings?

19 A. Well, you know, it gave me a good incentive to go
20 start my own business.

21 Q. All right. And you did. Or did you?

22 A. I did.

23 Q. What was the name of that business?

24 A. It was Phil Orbanes Productions, or POP for short.

25 Q. And this is 1990?

1 A. '91 I got started, yes. I incorporated in '91.

2 Q. Were there any other employees besides you?

3 A. No. One of the advantages I had for having been
4 in the industry that long is that I knew the best
5 outside talent, the best model makers, the best
6 electronic designers, the best graphics people, so I
7 didn't need to have employees. I would use outside
8 service providers to do any of the project work that I
9 took on.

10 Q. And what kind of work were you doing at POP?

11 A. I made myself available to all the toy companies,
12 all the -- pardon me, the game and toy companies in the
13 industry, and I did a lot of inventing which I would
14 submit on speculative basis, but I also took
15 assignments. If I took assignments from a company such
16 as Mattel, I would put together a resource team to
17 deliver what they were expecting.

18 Q. So did you get involved -- were you involved at
19 all with contractual arrangements between or with
20 inventors and designers?

21 A. Yeah, and I had been doing that most of my career.
22 In fact, my first contract I wrote in 1967.

23 Q. So how long was POP in existence?

24 A. POP was in existence until 1995.

25 Q. And where did you go from there?

1 A. In 1994 I was approached by a very successful
2 inventor agent named Tom Kramer. Tom's great claim to
3 fame was he found the Rubik's Cube when it was still in
4 Hungary and negotiated the right to manufacture and
5 license it around the world. So Tom Kramer was Rubik's
6 Cube.

7 Q. So I'm going to circle back to talk about Winning
8 Moves a little more in the context of some of the
9 claims that the Markham parties have raised, but let's
10 just get some of the nuts and bolts. So when did you
11 start at Winning Moves?

12 A. At Toy Fair of 1994 Tom asked to have dinner with
13 me and he explained that he had a vision for this new
14 game company, which ultimately became name known as
15 Winning Moves. And his vision was -- it was unique.
16 It was that Winning Moves would sell new games that
17 were not licensed with characters and it would be, it
18 would distribute through a subset of the retail
19 marketplace known as specialty retailing, which is
20 about 7 percent of the entire retail marketplace.

21 But here was the point of difference. The
22 company would have a relationship with a mass market
23 company, some big toy game company who would provide
24 the seed capital to get it going, and in return this
25 company would have the right to select products from

1 our line that we had proven actually had sales appeal.

2 Q. Who did that company end up --

3 A. Ultimately, after a search, Tom settled on Hasbro.

4 Q. Do you have an interest in Winning Moves?

5 A. I do.

6 Q. What percentage?

7 A. I have acquired 30 percent of the company.

8 Q. And does Hasbro have an interest?

9 A. Yes. At the initial inception of the company,
10 Hasbro, in order to gain this privilege, acquired
11 25 percent of the company.

12 Q. And did this business model that you described
13 work?

14 A. It took a long time before it actually worked.

15 Q. And is it still going on today?

16 A. No.

17 Q. When did that whole business model end?

18 A. I think it took about 10 years before we really
19 had satisfied Hasbro's expectations on the deal. And I
20 was working in those days with the president of Hasbro
21 games, whose name was David Wilson. When we reached
22 the point that we had satisfied the requirement, Dave
23 decided that it wasn't worth continuing and so the deal
24 expired. However, Dave, who had been a longtime
25 salesman in the industry, realized that Winning Moves

1 had one very strong accomplishment. We had established
2 a very effective sales network and specialty retailing
3 and we had built up -- I'm still the president at this
4 point -- I'm no longer the president, but we'll get to
5 that -- we had built up a very good reputation with our
6 accounts.

7 At that point, Hasbro was losing shelf space --
8 not losing shelf space, but they were losing SKUs,
9 stock keeping units at retail, and Dave said, you know,
10 we want to keep these games alive, you have the sales
11 network, I don't want to set up a special network, it's
12 just not worth my while, the volume is too tiny, why
13 don't you keep them alive in your marketplace. And so
14 Winning Moves changed from being what we
15 euphemistically called a product nursery into a
16 purveyor of licenses not only from Hasbro but from
17 several sources.

18 Q. So let me -- and again, we'll circle back to that
19 a little bit more, but let's talk about some of the
20 issues that got raised this morning with Mr. Carty.

21 You understand that the assignment agreement
22 that is the subject of this case was signed in 1959, --

23 A. Yes.

24 Q. -- which is approximately six years before you
25 were in the industry in earnest.

1 A. Yes.

2 Q. And explain to the Court, if you could, what your
3 experience is that you think allows you to talk about
4 industry custom and practice with regard to inventor
5 and designer relationships and those kinds of issues
6 dating back to 1959.

7 A. Sure. Well, first I should point out for the
8 Court that the game industry really didn't change until
9 the early 1980s, as Mr. Carty pointed out. The means
10 by which you contracted for services, the services you
11 needed to contract for, the materials that were used in
12 building prototypes, they didn't really change until
13 the advent of work stations and most significantly
14 machines that could create type on demand.

15 The other change that occurred in the industry
16 was the development of marketing. Back in 1959 really
17 through most of the 1970s big companies did not have
18 marketing departments. Parker Brothers was one of the
19 first because General Mills was a marketing-oriented
20 company. So the --

21 Q. Let me orient you a little bit because I think the
22 Court needs to be comfortable that you can potentially
23 help me. And the way you could potentially help is to
24 explain custom and practice with regard to
25 relationships between inventors and designers and the

1 commercial terms under which they worked, so can you
2 help the Court understand how you have that knowledge
3 that dates back to the late 1950s.

4 A. First of all, I mentioned this gentleman, Tom
5 Shaw, who was very kind in explaining to me how the
6 industry worked from his entry into it in early 1958.
7 Through Tom I also met a very successful team of
8 agents, Alice Nichols and Felicia Parker, who happened
9 to be the famous game inventors, agents at Sackson.
10 Tom thought it would be good for me to know them in the
11 event I had inventions that needed representation. So
12 they taught me how companies were approached, what
13 companies looked for, how you had to be very mindful of
14 trends and cost. And their experience dated back into
15 mid-1950s. Not much had changed by the mid-1960s.

16 The other thing was eventually I met Sid
17 Sackson, who was a very gracious individual. When I
18 went to Toy Fair the month after this photograph was
19 taken, Sid invited me to his home. He showed me not
20 only the manuscript for the book that he was writing,
21 which ironically was also called A Gamut of Games, but
22 he explained to me his dealings with the industry in
23 the late 1950s and showed me with pride his first
24 inventions.

25 Q. How would you describe your relationship with

1 Mr. Sackson?

2 A. It was -- it became an enduring friendship. And
3 as a matter of fact, I employed Mr. Sackson at Gamut of
4 Games to do inventing for products that we had
5 opportunities to publish.

6 Q. And one of the topics we want to talk with you
7 about involves these relationships between inventors
8 and designers and the commercial environment in which
9 they operated. We talked about that a little bit with
10 regard to your background, but maybe you can just
11 elaborate a little bit for the Court about your
12 experience with those kinds of contracts and
13 relationships.

14 A. With outside resources?

15 Q. Yes.

16 A. Well, from the very beginning I was fully
17 dependent on outside resources to bring my ideas to
18 life. For example, the game in this picture, The
19 Battle of Britain, I had to sign a work-for-hire
20 agreement with a company named Laws (phonetic) Printing
21 Industries, who had a design staff to do all of the
22 artwork for the game under my direction. So from that
23 point on I had a very strong comfort level in working
24 with outside resources to bring a product to fruition.

25 Q. And we've also asked you to look at derivative

1 work issues, comparing one version of the game to
2 another.

3 A. Yes.

4 Q. Can you explain to the Court with your experience
5 with the creation of games and the design and how that
6 would come to bear on that kind of testimony?

7 A. Yes. The primary purpose of an inventor's
8 prototype -- and by the way, I should point out that in
9 my experience I almost, I almost exclusively saw
10 finished prototypes, and inventors seldom presented
11 anything less than a prototype to any of my companies.
12 There's strong reasons for that.

13 But the prototype's purpose is to make a sale.
14 We used to joke in the industry that it was sizzle, not
15 steak, but that's okay. That was the reason why an
16 inventor put time and effort into creating a very
17 eye-catching prototype is he needed to inspire the
18 manufacturer that it could become a commercially
19 successful product, and it took away some of the
20 guesswork if it already had all of the bells and
21 whistles in it.

22 Q. And then how does that, how did your experience
23 bear on taking it from that stage to a commercial
24 product?

25 A. It was -- in the years that I was active in the

1 industry, I can tell you that sometimes a prototype was
2 changed so significantly that what came out the other
3 end bore almost no resemblance to what started. For
4 example, I remember one game that we licensed at Parker
5 Brothers where all we ended up with from the original
6 prototype was the very clever mover in the game. We
7 discarded everything else. At other times the inventor
8 had the good fortune with his idea and his execution
9 that not too much had to be done. So it really ran the
10 gamut.

11 Q. Okay. So a couple more questions about your
12 background. What's the Association For Games and
13 Puzzles International?

14 A. This is a 35-year old historical organization
15 whose charter is to promote the study and preservation
16 of games and games history, and it has been constantly
17 researching and publishing its findings during that
18 35 years.

19 Q. And how long have you been associated with that
20 association?

21 A. About 33 years.

22 Q. And what is your present position with that
23 association?

24 A. Yes. Currently, I'm the association's president.

25 Q. And how long have you been the president?

1 A. For about 18 months.

2 Q. How much time do you spend in that capacity?

3 A. A lot more than I probably would like to right
4 now. My mission and the reason why I agreed to become
5 president is because the organization needed to make a
6 very big transition from being print-oriented with this
7 research to getting all of this research published
8 online for the benefit of posterity. And so this is a
9 business as well as an informational challenge, and I
10 accepted the position and sometimes spend quite a lot
11 of my time each week taking care of it.

12 Q. I take it the history of the board game industry
13 is something that's important to you.

14 A. Yeah, it has been since I was young.

15 Q. Why is that?

16 A. I was always fascinated where games came from. I
17 figured out that somebody had to invent them; and as
18 time went on, I was delighted to find out who those
19 individuals were and how they went through the process.

20 Q. Can I ask you to go to Tab 10 of your binder,
21 which has been premarked as HTX107. And on this just
22 first tell us what this periodical is and then I'll
23 follow up.

24 A. Yeah. The AGPI, which in those days was known as
25 the AGPC, same organization, publishes its research

1 findings in this publication that's called
2 The Quarterly because it appears four times a year.
3 This particular issue came out after the organization's
4 annual convention. And at the convention someone with
5 distinguished achievement in the field of games,
6 puzzles or mechanical puzzles is recognized. And on
7 this particular occasion, I and one of the former
8 presidents of Parker Brothers were awarded the
9 organization's Bradley Parker Award.

10 Q. For distinguished achievement?

11 A. Yes.

12 Q. Is that what we see on page 3?

13 A. Yes.

14 MR. KRUMHOLZ: Your Honor, we ask to move HTX107
15 into evidence.

16 THE COURT: Any objection?

17 MR. POLLARO: Only to the extent it looks like
18 it's an excerpt, so we haven't seen the full document.

19 THE COURT: I take it that's correct. And is
20 this an excerpt?

21 MR. KRUMHOLZ: I think it is. We can replace it
22 with the whole document if need be.

23 THE COURT: All right. Can he do that?

24 MR. POLLARO: Yes, that's fine.

25 THE COURT: All right. Let's do that. So I'll

1 admit it subject to production of the entire document.

2 (Defendant's Exhibit HTX107 was admitted in
3 full)

4 Q. Do you have a collection that you maintain with
5 regard to board games?

6 A. I did. I very carefully built up a collection of
7 historically significant games.

8 Q. Where is that collection now preserved?

9 A. Well, if you look at the prior page it says, "The
10 Strong Behind the Scenes." The Strong Museum of Play
11 in Rochester is the world's leading repository of play
12 things. Over the course of the years they have
13 accumulated over 400,000. For example, they have most
14 of the archive from Sid Sackson, and in 2012 they
15 persuaded me that my collection deserved a permanent
16 home as well as my personal archives, so I agreed that
17 both of them would go to The Strong.

18 Q. Like your personal papers and your prototypes, is
19 that also at The Strong Museum?

20 A. Yeah. They wanted those for the library and I
21 guess for storage.

22 Q. And have you written any books on board games?

23 A. Yes. I'm the published author of four books on
24 games.

25 Q. And have you been interviewed or contributed to

1 other articles or periodicals?

2 A. Yes. Throughout my career I've written articles
3 on the game industry. I've been interviewed on
4 television, radio enumerable times, and a lot of
5 authors come to me to get information for articles that
6 they're writing about the game industry.

7 Q. And do you have any special affiliation with
8 Monopoly?

9 A. When I joined Parker Brothers in 1979, they found
10 out pretty quickly that I knew the game well and I was
11 asked if I would take over the responsibility of being
12 the chief judge at US & World Monopoly Championships,
13 which were held every few years.

14 Q. And are you still the chief judge?

15 A. I still am.

16 Q. Not the judge in this room, but otherwise the
17 chief judge.

18 A. No, no.

19 Q. So let me ask you some questions that have been
20 raised by the Markham parties with regard to potential
21 bias.

22 A. Yes.

23 Q. And you understand that that has concern both of
24 your opinions of Mr. Klammer as well as your involvement
25 with Winning Moves.

1 A. Yes.

2 Q. So let's deal with Mr. Klamer. When did you first
3 meet him?

4 A. In 1984 at an industry gathering.

5 Q. Did you see him periodically thereafter?

6 A. I had just become the senior vice-president of R&D
7 at Parker Brothers and I was about to go on my first
8 inventor tour, and Mr. Klamer said to me, You've got to
9 come see me, I have some Nerf items that I think will
10 be right for your line.

11 Q. So did you over the years form any opinions about
12 Mr. Klamer -- well, actually, let me ask you this
13 first. How would you describe your relationship with
14 Mr. Klamer?

15 A. Well, I think Mr. Pollaro in my deposition came up
16 with a term that I never used before but it's very
17 appropriate, and he asked me if I was business friends
18 with Mr. Klamer, and I thought about this and I
19 realized that anyone that I feel comfortable in
20 conducting transactions on behalf of my company for
21 which, for whom I had prior experience is a business
22 friend, as opposed to a business adversary or business
23 acquaintance. And I would also say that at least
24 70 percent of the inventors that I have worked with
25 under that definition would be business friends, and

1 that would include Mr. Klamer.

2 Q. At the request of the Markham parties have you
3 provided any communications between yourself and
4 Mr. Klamer in this case?

5 A. Yes. That request was made after I submitted my
6 reports.

7 Q. And can we go to Tab 9, which is HTX105.

8 MR. KRUMHOLZ: This is not admitted, but there's
9 no objection so I'll just move now that it be admitted.

10 THE COURT: Without objection?

11 MR. POLLARO: No objection.

12 THE COURT: All right. This will be -- what
13 exhibit number is this?

14 MR. KRUMHOLZ: HTX105.

15 (Defendant's Exhibit HTX105 was admitted in
16 full)

17 Q. Is this e-mail back and forth between you and
18 Mr. Klamer?

19 A. It is.

20 Q. And at least the bottom e-mail is dated August 3,
21 2010. Was your e-mail above it around that same time?

22 A. Yes, I'm sure it was.

23 Q. I'm going to refer you to the PS, and I'll read it
24 out loud, then I'll ask you a couple of questions.

25 "PS: I have always admired you for the

1 following qualities, Ruben: Engaging, straightforward,
2 clear-thinking, not egotistical like many of your
3 rivals, perhaps even tender, informative, even-keeled,
4 warm. All of these qualities show through in your
5 writing style. The big advantage is that the reader
6 instinctively, easily accepts the lessons you impart
7 without thinking he or she is being talked down to or
8 boasted to. My compliments."

9 So let me just ask you first before I ask for
10 context. Are these, do these reflect your views about
11 Mr. Klamer?

12 A. Yes, especially in regards to his attraction to
13 our publisher.

14 Q. What was the context in which you sent the e-mail?

15 A. First I'd say that since I became a published
16 author in the late 1980s, any number of game inventors
17 who also wished that they could get into publishing
18 have asked me how do you do it, what does it take? And
19 what I realized over time is it's not just your
20 manuscript, it's who you are. Publishers want somebody
21 who can promote their book because, quite frankly, they
22 don't have a lot of budget to do it on their own, so
23 they will arrange for radio interviews and book
24 signings and they need somebody whose qualities will be
25 projected.

1 So over time I began to realize that this is
2 what I need to help these game inventors with, is who
3 are you and why might you be appealing to a publisher.

4 Q. So let me ask you, does your professional
5 relationship with or your views of Mr. Klamer prevent
6 you from being impartial in this case?

7 A. No. As an experienced expert witness, I know I
8 must compartmentalize my personal opinions and I
9 wouldn't let that interfere.

10 Q. Are your opinions dependent on your views of
11 Mr. Klamer?

12 A. No, they're not.

13 Q. Are any of your opinions in any way dependent on
14 your assessment of the credibility of any of the
15 witnesses?

16 A. No.

17 Q. I'd like to ask you about something you said in
18 your deposition.

19 MR. KRUMHOLZ: Your Honor, you should have a
20 transcript up there, and I believe you should have the
21 transcript --

22 THE COURT: Yes.

23 MR. KRUMHOLZ: -- as well.

24 THE COURT: Go ahead.

25 MR. POLLARO: If I may, I believe Mr. Krumholz

1 is going to get to the very point of our motion to
2 strike that's pending with the Court.

3 THE COURT: All right. Well, first of all, it's
4 unusual to direct a witness to something in his
5 deposition on direct examination. So what's the
6 purpose of that?

7 MR. KRUMHOLZ: The purpose is, at least in my
8 experience, your Honor, that we're afforded the
9 opportunity for him to explain some testimony that he
10 gave in the direct case during his direct examination.
11 So there's a Q and A that was highlighted in their
12 papers that does indeed form the basis of their motion
13 and I want to -- that the witness has an explanation
14 for that answer, and I want to afford the Court an
15 opportunity to hear that explanation.

16 THE COURT: All right. Well, I have not had an
17 opportunity to read the motion because that was just
18 filed. Somewhere here I have a copy of it.

19 MR. KRUMHOLZ: It's not the errata motion. It's
20 the *in limine* motion.

21 THE COURT: Oh, I see. Okay. So I thought you
22 were referring to the errata motion.

23 MR. POLLARO: It is. It's both, your Honor.

24 MR. KRUMHOLZ: Well, I guess it is both. And we
25 could care less about the errata sheet. It's a

1 complete nonissue for us. I think they're wrong on the
2 law in terms of what he can do with an errata, but it
3 doesn't expunge the testimony anyway so that's what we
4 want to talk about.

5 MR. POLLARO: Your Honor, if I may, then it
6 sounds like that would be if I bring it up on cross he
7 can redirect on that. I think that would be the
8 easiest solution.

9 THE COURT: On the errata or on this point?

10 MR. POLLARO: This point is the errata.

11 THE COURT: Here's what we're going to do. I'm
12 going to allow you to go ahead and inquire on it on
13 direct and then you can deal with it on cross and then,
14 as with everything in your motions *in limine*, I've
15 taken all of that under advisement, and I'll deal with
16 it when I get to the point of making my decision here.
17 So go ahead.

18 MR. KRUMHOLZ: Thank you, your Honor.

19 THE COURT: Actually, I'm not sure I have a copy
20 of the deposition.

21 MR. KRUMHOLZ: I think you do now.

22 THE COURT: Here it is.

23 THE WITNESS: It's not in my binder.

24 MR. KRUMHOLZ: It's not in your binder?

25 THE WITNESS: No. I just have the index.

1 MR. KRUMHOLZ: That's okay. We can correct
2 that.

3 May I approach, your Honor.

4 THE COURT: Yes.

5 THE WITNESS: Thank you.

6 Q. If you could turn to page 49, starting at line 10.

7 A. Yes.

8 Q. And I'll just read it out loud and inquire of you
9 thereafter.

10 "Question: Are the opinions expressed in your
11 reports based on your testimony that you believe Ruben
12 Klamer to be trustworthy?"

13 And you say:

14 "Answer: In my experience he has always been
15 trustworthy.

16 "Question: And your opinions in your report are
17 based on that fact; is that correct?

18 "Answer: Yes, they are."

19 Is that indeed what you said in the deposition?

20 A. It's what I said, yes.

21 Q. And does it accurately reflect your opinions?

22 A. No, I, with apologies, had become confused at this
23 point. I thought we were talking about what I was
24 basing my opinion on that Mr. Klamer was trustworthy,
25 and I simply overlooked the question that Mr. Pollaro

1 asked, which was am I basing my opinions and report on
2 that. I'm sorry.

3 Q. Okay. So have we asked you to assume facts for
4 purposes of your testimony?

5 A. Yes.

6 Q. And did you do that in your report?

7 A. I did.

8 Q. And are you prepared to do that today?

9 A. I am.

10 Q. And if Mr. Pollaro on cross-examination has
11 appropriate hypotheticals, are you prepared to answer
12 those as well?

13 A. I am.

14 Q. Okay. So let's talk quickly about Winning Moves
15 and then get to the substance of your testimony.

16 A. Certainly.

17 Q. What's your current position at Winning Moves?

18 A. I retired from active management in 2013. I'm
19 known as the vice-chairman of Winning Moves now.

20 Q. So do you have any role in the day-to-day
21 operations of the company?

22 A. None.

23 Q. But you still do own your interest?

24 A. Sorry?

25 Q. You still do own your equity interest?

1 A. I do.

2 Q. And Hasbro still owns its?

3 A. It does.

4 Q. And in your deposition, did you indicate that you
5 needed Hasbro's permission before selling your shares?

6 A. Yes, I did say that, but I misremembered the
7 nature of the agreement. It's been ages since I looked
8 at it.

9 Q. Since that time, have you looked at the actual
10 shareholder agreement?

11 A. I have.

12 MR. KRUMHOLZ: And the shareholder agreement is
13 at Tab 11, which is HTX109, also been designated as
14 PTX296. We ask that that be admitted.

15 THE COURT: All right. Is there any objection
16 to the PTX -- or HTX109?

17 MR. POLLARO: No objection.

18 (Defendant's Exhibit HTX109 was admitted in
19 full)

20 Q. And I don't want to spend a lot of time getting
21 into the weeds on the language, but can you just
22 explain to the Court what restriction, if any, you have
23 on selling your shares.

24 A. Yeah. Well, most importantly, I have no
25 restriction to pass my shares down to my heirs. I have

1 no restriction to sell my shares with one
2 qualification, and that is that Hasbro is entitled to
3 match the offer. The reason that's in there is because
4 when Winning Moves was started and had a different
5 charter Hasbro was the beneficiary potentially of
6 products that we were creating and bringing to market,
7 and they didn't want to wake up one morning and decide
8 the four founders had suddenly decided, well, let's
9 sell our shares to Mattel, so Hasbro made sure that in
10 the event we had a bona fide offer they could match it.

11 Q. Okay. So you've been accused of agreeing to
12 testify to curry favor with Hasbro. Is that a fair
13 accusation?

14 A. Yes.

15 Q. Yes, that is a fair accusation?

16 A. No, no. Yes, that I was accused. I'm not saying
17 it's fair. Sorry.

18 Q. So is that a fair accusation?

19 A. No, it's not.

20 Q. Why not?

21 A. Because this was a one and done. I can tell you
22 that when this deal was made, Hasbro was in the process
23 of acquiring huge companies like Wizards of the Coast
24 and Tiger Electronics for hundreds of millions of
25 dollars.

1 After this was made, it literally was forgotten.
2 As a matter of fact, I can recall two times in ensuing
3 years where I had to go to Hasbro, remind them of this
4 and point out that Winning Moves needed to issue more
5 shares and they were entitled to purchase their
6 prorated share, and their response was no, thanks,
7 proceed as you want.

8 Q. Do you have any ability to influence Hasbro's
9 decisions?

10 A. No, I don't.

11 Q. At this point do you have any ability to influence
12 Winning Moves' decisions?

13 A. Management would rebel if I did.

14 Q. Do you presently have any relationships at Hasbro?

15 A. I haven't had a relationship with a Hasbro
16 executive, a business relationship since Dave Wilson
17 left, which was somewhere around 2007.

18 Q. So Winning Moves does license some products from
19 Hasbro?

20 A. Yes. That new arrangement that I mentioned that
21 really got going around 2006, 2007 continues.

22 Q. So would you be negatively impacted if Hasbro no
23 longer had the ability to license the classic version
24 of Game of Life to Winning Moves?

25 A. Yeah, in a minor way. We love having the game.

1 It's prestigious to have it, but it's the single most
2 expensive game that Winning Moves made when I was
3 running the company. I assume it still is. So its
4 profits aren't as strong as other games.

5 Probably just as significantly it's a
6 nonexclusive contract, and we found out at Toy Fair
7 this year that Hasbro in fact licensed the 1960 version
8 of The Game of Life to one of our competitors, the only
9 difference being the packaging. That has resulted in a
10 significant reduction in the sales forecast, I'm told.

11 Q. Would you let your relationships with Hasbro,
12 Mr. Klamer or Winning Moves impact your testimony in
13 any way?

14 A. No. My reputation as a reliable expert witness
15 and as a game historian are crucial to me. Well, I
16 shouldn't say crucial. They just mean a lot to me
17 personally, so, no, I wouldn't.

18 MR. KRUMHOLZ: Your Honor, at this point I'm
19 going to move into substance or I'm going to keep going
20 or take a break.

21 THE COURT: It might be a good time to take our
22 afternoon break so let's do that. Take about a
23 10-minute break or so.

24 (Recess)

25 THE COURT: You may proceed.

1 MR. KRUMHOLZ: Thank you, your Honor.

2 Q. Mr. Orbanes, I'd like to ask you some questions
3 now with regard to issues related to the work-for-hire
4 issue before the Court.

5 A. Yes.

6 Q. I'm going to be asking you to assume a series of
7 facts and then ask you your opinions with regard to
8 those assumed facts. Okay?

9 A. I understand.

10 Q. So I'm going to start with three. I'd like you to
11 assume that Milton Bradley asked Mr. Klamer to come up
12 with a game to celebrate its 100th anniversary, okay?
13 Two, after discovering The Checkered Game of Life,
14 Mr. Klamer conceived of a game that would be based on
15 life events that would have a circuitous track, a
16 spinner, and three-dimensional components, and that he
17 retained Mr. Markham and his company to develop a
18 prototype based on those concepts and, in fact,
19 Mr. Markham's company did that. Okay?

20 A. Yes.

21 Q. Is that a usual or unusual scenario in your
22 experience? And let's put it in the time frame of the
23 late 1950s or early 1960s.

24 MR. POLLARO: Objection, your Honor. Relevance.
25 Foundation. Same reason that happened to Mr. Carty.

1 THE COURT: Well, I don't think it's irrelevant.
2 I actually do though have a question about your
3 question. You've asked him to assume certain facts and
4 now you want to ask him if that's a usual or unusual
5 scenario.

6 MR. KRUMHOLZ: Yes. So what I would want to try
7 to establish for the predicate for his testimony is
8 that the kind of scenario where you have somebody
9 acting as an inventor that came up with a concept that
10 then retained a design firm to execute that prototype,
11 that kind of scenario, that that is indeed very common
12 in the industry, and then from that he can offer his
13 views based on his experience about who typically takes
14 the economic risk in that environment, who typically
15 keeps control in the environment.

16 THE COURT: I'll allow it, so I'll overrule the
17 objection, but why don't you be a little more precise
18 about the way you ask the question, similar to what you
19 just did in explaining it to me.

20 MR. KRUMHOLZ: Okay.

21 MR. POLLARO: Could I add disclosure to that?
22 I'm just trying to make sure where that is.

23 MR. KRUMHOLZ: We talk about this in paragraphs
24 34, 73, and 74; paragraph 149, 154, 155, 157, 158. I
25 guess apparently more than that. This is a major part

1 of his disclosure.

2 THE COURT: All right. So proceed.

3 Q. So let me ask a couple more predicate questions.
4 Do you still have the assumed facts in your head?

5 A. Yes, I do.

6 Q. So in your experience, what role is Mr. Klamer
7 playing in that kind of scenario?

8 A. Mr. Klamer is the inventor and the client in the
9 development process.

10 Q. And when you say "inventor," is there a meaning in
11 the game industry?

12 A. Yeah, we have a lot of description of the roles
13 that individuals play during the evolutionary process
14 of a new game, and the most important one is that in
15 the industry the person who has the eureka moment is
16 the inventor and that is the person who comes up with
17 the initial idea, coupled with either an opportunity or
18 a challenge.

19 So under the facts that you asked me to assume,
20 the challenge was by Milton Bradley to come up with a
21 100th anniversary game, and when Mr. Klamer was in the
22 archive and saw the 1860 Checkered Game of Life, he
23 came up with an idea that addressed the opportunity and
24 the challenge.

25 Q. Okay. So that puts him in the inventor bucket.

1 **A.** Correct.

2 **Q.** And again working with these assumed facts about
3 the role that Mr. Markham's company played, what
4 bucket, if any, does his company or his work fall into,
5 based on your experience?

6 **A.** I think I can explain this in some simple terms.
7 In the industry we refer to the phases of invention,
8 design and development as looks like, plays like, works
9 like. And looks like is the invention; plays like is
10 the development of a plan that will take the idea and
11 turn it into something with mass application; and then
12 the development is actually building the prototype
13 according to the plan.

14 So in this scenario as you've outlined it,
15 Mr. Markham and his team designed and developed the
16 prototype at the instance of Mr. Klamer.

17 **Q.** And how common is it in your experience to have a
18 scenario where you have this one person who has the
19 eureka moment, who comes up with the idea and the
20 opportunity and retains another to create the
21 prototype?

22 **A.** In my experience in working with hundreds of
23 inventors, most of them are very good at coming up with
24 ideas and knowing what they want, but they don't have
25 the physical skills to actually design and build. As a

1 result, it's very common that they need to hire the
2 talent necessary to turn their idea into reality.

3 Q. And do you have an understanding, based on your
4 experience in this type of scenario, who typically
5 retains control of the project?

6 A. It's always the inventor because the inventor
7 knows what is necessary in order to satisfy the
8 opportunity that he has been presented with.

9 Q. And I guess, conversely, why not the designer?

10 A. Because the, well, the designer and the developer,
11 is the --

12 Q. Sure.

13 A. The designer is usually a very gifted person who
14 can take that idea and translate it into a plan. The
15 developer is usually a team of gifted people who have
16 the means to basically look at a specification and then
17 build the model.

18 Q. So let me ask you to assume two more facts as we
19 build out this hypothetical. Mr. Klamer retained the
20 right to approve the design and to approve the
21 prototype itself --

22 A. Yes.

23 Q. -- and that he visited Mr. Markham's shop
24 approximately twice a week while the project was going
25 on to provide input and to make necessary decisions.

1 A. Yes.

2 Q. Okay. Are those facts consistent or inconsistent
3 with your experience of these kinds of situations that
4 we've been talking about?

5 A. Yes. And I've had virtually identical experiences
6 myself.

7 Q. So is it consistent or inconsistent?

8 A. It's consistent.

9 Q. How is it consistent with your experience?

10 A. Would you like to give me an -- would you like me
11 to give you an example?

12 Q. Sure.

13 A. Okay. When I arrived in New York City in the
14 summer of 1969, soon thereafter my boss said to me on a
15 Monday morning we have a great opportunity to present
16 an astrology game to a promotional firm in Philadelphia
17 next Monday, come up with something. I didn't know
18 anything about astrology. With my science background I
19 had studied astronomy, but astrology was something
20 completely different.

21 So I investigated it and realized by Friday that
22 consumers really wouldn't want a game based on
23 astrology. What they would want would be a device that
24 they could compose their own horoscope with in the
25 privacy of their home. And on my way home from work

1 that Friday I acquired all the materials that I needed
2 to build a crude working model, which I did over the
3 weekend.

4 I met my boss on the train going to Philadelphia
5 that following Monday, and the company that we showed
6 this to flipped over it because in that era the occult
7 was a very popular trend. In fact, the Ouija Board was
8 outselling Monopoly almost two to one. It was the
9 Vietnam War and all the uncertainty.

10 So when we got back to my company in New York,
11 that feedback gave them confidence to say this belongs
12 in our product line. What they then did was to
13 identify, if you will, a Bill Markham. This was a firm
14 named Francis Blod & Associates at One East 53rd
15 Street, and they contracted on a work-for-hire basis
16 with Francis Blod. I, as the inventor of the concept,
17 then ran the project, and we had a kickoff meeting
18 where Francis Blod himself was present and introduced
19 me to the two designers that he would assign to run the
20 project for me.

21 Francis Blod just happened to be a very
22 acclaimed industrial designer instructor at Pratt. I
23 never saw him again, quite frankly, until the project
24 was done. But the two designers he assigned me were
25 Fred Feucht and Dan November. Fred was graphics, and

1 Dan was an industrial designer, which meant he would
2 create the three-dimensional parts. And during the
3 course of probably six to eight weeks I visited the
4 company twice a week to make decisions to keep the
5 project on track, and eventually we selected a design
6 based on sketches. Fred then executed the graphics. I
7 hired a copywriter because this product had a lot of
8 copy that would have to be done in a very good,
9 professional manner. Dan designed the
10 three-dimensional very beautiful looking computer-like
11 object that this became; and from time to time, the
12 molding engineer from the Learning Aids Group would
13 accompany me and make sure that Dan's work could
14 ultimately be moldable, in other words, that tooling
15 could be made and the parts that the tooling made would
16 be feasible.

17 Q. So in this scenario, this example that you're
18 giving, who retained control?

19 A. I did on behalf of my company.

20 Q. And your company was the one that had come up with
21 the idea and hired a designer to execute it?

22 A. I came up with the idea on behalf of my company.

23 Q. Right.

24 A. But they selected the design house, and then I
25 took over the -- it was at my instance that they

1 designed.

2 Q. And how, in your experience, how common or
3 uncommon was that example that you gave in terms of who
4 retained control?

5 A. It's almost always the inventor.

6 Q. Can you think of circumstances where the design
7 firm would be the one retaining control?

8 A. Only if the inventor really didn't have an
9 assignment. I mean, if the inventor didn't have an
10 opportunity and he was looking to spark ideas just for
11 the sake of being able to present them, yeah, in that
12 scenario he might turn to a design house and say do you
13 want to speculate with me; but not when you know what
14 you want and you have time pressure in particular.

15 Q. Okay. So staying with these same facts that I've
16 asked you to assume, in the game industry when it comes
17 to these kinds of inventions and new game concepts, who
18 typically retains the economic risk?

19 A. The inventor.

20 Q. How common is it for the inventor to be the one
21 retaining the economic risks?

22 A. Well, it's very common, and I can explain why.
23 There's a real difference in the roles played by a
24 service provider and an inventor. An inventor doesn't
25 get a salary. He doesn't get a paycheck. His

1 existence and his financial success is based on
2 royalties, which are speculative.

3 A service provider, especially a design
4 organization, is interested in cash flow and they need
5 to pay their overhead, which means that they need to
6 continually find sources of revenue.

7 There are invention houses that some of whom are
8 successful, but they do not do design work on spec.
9 They do creative work and take the same risk as an
10 individual inventor.

11 Q. So I'm going to ask you to assume a couple more
12 hypotheticals.

13 A. Certainly.

14 Q. And I'll ask you to assume that Mr. Klamer
15 unconditionally agreed to pay Mr. Markham's
16 out-of-pocket costs and the salary for six weeks of
17 Ms. Chambers and Mr. Israel.

18 Are terms like that consistent or inconsistent
19 with your experience in the industry, again, for the
20 totality of these assumed facts?

21 A. Very consistent.

22 Q. How so?

23 A. Work-for-hire is the means by which an inventor in
24 this case normally contracts for services.

25 Q. Let me ask you to assume that Mr. Klamer also

1 agreed to allocate to Mr. Markham 30 percent of the
2 royalty that Link Research hoped to receive if the game
3 was successful.

4 A. Yes.

5 Q. Okay? How common is it for an inventor to both
6 cover the costs and also pay a royalty?

7 A. It's circumstantial. And in my experience,
8 because I've done this too, the reason why you give --
9 in the industry it's called points. The reason why you
10 give points away is because you need something
11 exceptional, perhaps you need a really strong creative
12 contribution or you just need to get it fast.

13 I've had many experiences where typically I
14 would give away what's one-and-a-half points. That
15 means I give away one-and-a-half percent of a typical
16 5 percent royalty, which just happens to be 30 percent.
17 It's not something that an inventor likes to do, but
18 they realize that at times it's very important to
19 provide motivation.

20 Q. So were there factors that you saw here in looking
21 at the record that would be consistent with creating
22 this economic incentive of giving a royalty while still
23 covering the costs?

24 A. Yes, and there's two reasons that my experience
25 can reap what to bear here on this. The first is

1 Mr. Taft, as I understand it, had set a date when he
2 would be in Los Angeles and expected to see something,
3 and that happened to be about six weeks, I believe,
4 after Mr. Klamer saw The Checker Game of Life in the
5 library. As Mr. Carty testified this morning, that is
6 a very accelerated period of time.

7 Secondly, there really wasn't the time to do
8 this project in sequence. In other words, after the
9 concept that Mr. Klamer came up with was presented,
10 normally you would have a design phase and you would
11 come to a design that you would then with confidence
12 say let's build the model.

13 In this case, Mr. Markham and his team and
14 Mr. Klamer had to compress that schedule, so design and
15 development overlapped, and given that, I think that,
16 you know, royalty sharing was pretty appropriate.

17 I also should add, by the way, that the
18 materials that as I understand it were used to make the
19 prototype for The Game of Life were pretty much the
20 same materials I used just a few years later, cardboard
21 and balsawood. So you weren't at the mercy, let's say,
22 of having to fabricate plastic parts in order to have a
23 looks-like prototype. So it was feasible, but it was
24 an accelerated schedule.

25 Q. And that would be motivation to not only cover

1 costs but give a royalty?

2 A. Yes.

3 Q. While we're on this topic that you just mentioned,
4 you heard Mr. Carty talking about the timeline, excuse
5 me, during his direct exam.

6 A. Yes.

7 Q. And he suggested that that timeline seemed
8 unlikely -- it was unlikely that it could be done in
9 four to six weeks.

10 A. Right.

11 Q. What's your reaction to that testimony?

12 A. Well, I don't think we're talking about apples to
13 apples because the games that Mr. Carty was most
14 familiar with are very rule-intensive. They require a
15 lot of time to perfect because otherwise the players of
16 these games literally rebel; but in the mass market
17 when you're doing toy-like games, the rules tend to be
18 fairly simplistic and the materials are more
19 significant, let's say, than the need to have very
20 intricate rules that will make a game playable for a
21 long period of time, so that pressure is removed.

22 And I know from experience that sometimes I've
23 given an inventor an assignment and in two weeks I've
24 got a working prototype.

25 Q. So in your experience, is it certainly conceivable

1 that they could have gotten from concept to prototype
2 in this four- to six-week period?

3 A. Yeah. I would have thought it would be a
4 thrilling process, too, to have this opportunity and
5 the time pressure, you know, you live for this actually
6 and you move heaven and earth to make it happen.

7 Q. And going back to what we were just talking about,
8 in your view based on your experiences, does the
9 presence of a royalty under these circumstances suggest
10 to you that Mr. Markham was sharing in the economic
11 risk?

12 A. No, I think that that's apart from the economic --
13 apart from the work-for-hire. This was for a special
14 purpose.

15 Q. And you understand that the assignment agreement
16 provided Mr. Markham with 30 percent of whatever
17 royalties that Link Research received?

18 A. Yes.

19 Q. And was that, in your view, based on your
20 experience with these kinds of deals, a fair deal for
21 Mr. Markham?

22 A. I think it was a generous deal because typically
23 inventors earn 5 percent, but because of the presence
24 of Mr. Linkletter in this equation, who had agreed for
25 an entire year he would promote it on his number one

1 children's program, it was rather generous to base the
2 30 percent on 6, which included the promotional up
3 charge instead of the typical 5 percent.

4 MR. KRUMHOLZ: So unless your Honor has some
5 questions on this topic, I'm going to move to
6 derivative works at this point.

7 THE COURT: That's fine.

8 Q. So let's talk about the derivative works analysis
9 that you did. And I want to begin by talking about the
10 process from getting a game from prototype to
11 commercial product like we talked about with Mr. Carty.

12 A. Right.

13 Q. Are you familiar with the general practices that
14 companies employed in 1950s and 1960s for getting a
15 board game from prototype to commercial product?

16 A. Yes, I am.

17 Q. And your familiarity comes from what you talked
18 about before the break in terms of your experience?

19 A. Yes. The practices didn't change very much during
20 that era, and I had several good mentors whose
21 experience reached back into the mid-1950s.

22 Q. Can you list for us the different departments in a
23 game company like Milton Bradley during 1950s and 1960s
24 that touch upon this process.

25 MR. POLLARO: Objection, your Honor. Relevance.

1 Foundation.

2 THE COURT: Overruled.

3 A. In the R&D Department there would be four groups.
4 There would be preliminary design, which basically
5 comprised inventive people because they had to convert
6 an invention into a commercial invention.

7 There would be graphic design, industrial
8 design, and engineering.

9 Q. This is all within the research and development
10 group?

11 A. All within the first department. But two other
12 departments that would bear heavily on the decision
13 back then were manufacturing, as Mr. Carty pointed out,
14 as well as sales.

15 In that era, marketing was not powerful. It was
16 not a separate organization. Today it's generally the
17 most important department.

18 Q. So let's take each of these in turn. What role
19 back in that time frame would the Research &
20 Development Department play?

21 A. Well, the most important task of the Research &
22 Development Department is to take the inventor's
23 prototype and make it playable for the target market to
24 make sure that it plays smoothly without controversy
25 and that it has a suggested look and feel that's

1 consistent with the expectations of that market.

2 The Graphic Department will then take the
3 responsibility to prepare what in those days was called
4 camera-ready art. That would be all of the materials
5 needed to actually produce the printing plates that
6 would make the game, make the printed components on the
7 assembly line.

8 The Industrial Design Department would be
9 responsible for styling and drawing the part drawings
10 for all the dimensional plastics that were in the game.

11 The Engineering Group would be responsible for
12 taking those part drawings and converting them into
13 engineering drawings that could then be sent to an
14 outside mold maker who could build the tools to make
15 those plastic parts.

16 Q. So this is just the R&D Department so far?

17 A. Right. And in the industry there's a euphemism,
18 which is a product starts off and it's shades of gray
19 but it ends up black and white by the time it ends its
20 journey through product development. And that just
21 simply means that manufacturing has a specific
22 specification that it can build into a production.

23 Q. All right. So then let's shift to manufacturing.
24 What role back -- so when I ask you these question I'm
25 talking about the late 1950s, early 1960s.

1 A. Correct.

2 Q. During that time frame, what role did the
3 Manufacturing Department in a company like Milton
4 Bradley play in bringing a product from prototype to
5 commercial?

6 A. In the words of the R&D people who are familiar,
7 they were the wet blanket. And by that --

8 Q. Usually the role of lawyers.

9 A. Pardon me?

10 Q. Usually the role of lawyers.

11 A. They were the restraining factor. They had to
12 know that this game and all the pieces that went into
13 it could actually be physically produced on an assembly
14 line.

15 They had to know that the game board, the
16 printed components, the cards, decks, any boxes and
17 trays actually could be physically made given their
18 sizes on their preexisting equipment.

19 They really didn't like the idea, let's say, of
20 a new game board size because that meant whole new jigs
21 and fixtures. And the other thing they needed to do
22 was to make sure that the nature of the design actually
23 could be made on an assembly line.

24 In addition to those restraints, the Sales
25 Department -- I need to jump ahead at this point -- had

1 come forth and provided input on how big the package
2 had to be and the retail price point to satisfy the
3 interests of the trade. If the box was not big enough
4 for the price point, the trade would be resistive
5 because they had so many other competitive products
6 that a price point associated with packet size that
7 they would be concerned. Let's say if it was, if you
8 package it to look like Monopoly, it better cost the
9 same as Monopoly. Well, The Game of Life was far
10 bigger, so the actual package ended up being bigger and
11 the price point determined on which you could afford to
12 spend to make this game, so that again figured into
13 manufacturing's equation when they would impose their
14 wet blanket.

15 **Q.** So you started talking about sales. Have you
16 covered the relevant sales play?

17 **A.** Yes. Sales in those days was the company's eyes
18 and ears. They knew what was happening in the retail
19 marketplace. They knew what retailers were happy with.
20 They knew what competitive products were selling, and
21 that feedback was coming into the company not just
22 about new games under development but also about games
23 that were already in the line that perhaps had some
24 deficiencies and needed to be fixed.

25 **Q.** So how important was this process to getting from

1 a prototype to a commercially successful product?

2 A. Well, it's critical. You don't have a commercial
3 product when the prototype comes in. The inventor has
4 completed his task when he presents as I said before
5 what's generally called the sizzle model, but now you
6 need the talent of all of these groups within R&D to
7 convert the promise of that prototype into a
8 commercially feasible product, which means it could be
9 made, it could be made for a cost, and it has the
10 aesthetic considerations necessary for it to appeal to
11 the target market.

12 Q. Let's talk about that last point, the aesthetic
13 considerations. What do you mean by that?

14 A. That's the look, feel, and the specific design of
15 all the components in the game, be they printed or be
16 they molded.

17 Q. And how important are the aesthetics, getting the
18 aesthetics right by, you know, the development team?
19 How important is that to a commercially successful
20 product?

21 A. It's generally the difference between success and
22 failure because if you miss your target market's
23 expectations in the visual appeal of the product, it
24 won't leave the shelf.

25 Q. And in your experience, how often are aesthetics

1 changed when, you start with a prototype, to get to the
2 commercial product?

3 A. Often.

4 Q. Okay. Could you elaborate?

5 A. A lot of times the inventor tries very hard and
6 submits a prototype that just is too cluttered and
7 there's just too much going on, and it achieves the
8 purpose, the purpose being to gain attention, but
9 generally it's been my experience in the development
10 process that the excess gets stripped away and what's
11 left is better tailored to satisfy the feat. In other
12 words, you don't want to have a lot of nongame
13 composition to distract from the actual play of the
14 game, but whatever you have needs to trigger in the
15 game player's mind imagery that brings to life that
16 theme.

17 Q. Can changes in design that may seem small to
18 somebody like me be important to somebody like you?

19 A. One of the best subjects -- I'll answer it this
20 way. One of the best subjects that I studied in
21 college was called The Psychology of Design and Color,
22 and what I learned in that course is that small changes
23 and small modifications of design elements have
24 overwhelming impact at times.

25 A lot of the consumer products that you see in

1 the marketplace then as well as now have been subjected
2 to testing in which very small changes are presented in
3 a series of alternatives, and the one that has the
4 highest rating in consumer testing is often not that
5 much different from the ones that are number two,
6 three, and four.

7 Q. But the difference --

8 A. Is critical.

9 Q. -- matters?

10 A. Yes.

11 Q. At our request, have you done an analysis
12 comparing the photos from the prototype to various
13 commercial versions of The Game of Life?

14 A. I have.

15 Q. So let's spend a little time talking about that.
16 We have -- I think everybody should have and you should
17 have, I think hopefully the Court still has the images
18 for the demonstratives that we put together.

19 MR. KRUMHOLZ: With the Court's permission, I'll
20 put some posters on the board.

21 THE COURT: Yes.

22 Q. Okay?

23 A. Okay.

24 Q. And this is also pages 7 and 8 from the
25 demonstratives that we previously provided.

1 So obviously the first thing I'd like to ask you
2 about are the box covers between The Game of Life
3 prototype and some early versions of the commercial
4 game version that have a 1960 copyright.

5 A. Yes.

6 Q. Before I get to those images, let me ask just a
7 little background on the role of box covers.

8 What role does a box cover play in the overall
9 success of a game?

10 A. It is typically the first contact that the
11 consumer will have with the product that's packaged
12 inside the box; and the importance, therefore, is to
13 accurately and in an appealing fashion communicate the
14 game, its name and its nature, so that the consumer
15 knows what it is without confusion and hopefully will
16 find it to be of interest to pick it up and look
17 further.

18 Q. And how important is a box cover to a game's
19 commercial success?

20 A. Well, you know, if you talk to a lot of people
21 that I did in the industry after every game fails, they
22 often said it was a lousy package, even though at the
23 time it may have been something that somebody favors.
24 So the answer is the package is very, very significant,
25 especially in the early takeaway, as we call it, of the

1 product at retail.

2 Q. What do you mean by "takeaway"?

3 A. In other words, evoking a sale. Typically, games
4 are put on the shelf before there is a promotional
5 campaign in the fall, and what you want to see is the
6 consumer is attracted to the package in order to get
7 the game moving at retail, which provides confidence to
8 the retailer to carry it in-depth come the fall selling
9 season.

10 Q. Okay. So let's jump in and talk about what
11 similarities and differences you found and the
12 conclusions that you drew with regard to them.

13 We have on the left, which is page 7 in the
14 demonstrative package, it says, Prototype and Early
15 Commercial Version Box Cover Similarities. Do you
16 recognize the upper left as the prototype box cover?

17 A. I do.

18 Q. And the other two images are the top and the side
19 of one of the 1960 copyright versions?

20 A. Yes, it could be the first version.

21 Q. And we have this lettering on here, A, A, B, B.
22 Do you see that?

23 A. Yes, I do.

24 Q. Is that something you created to just help us walk
25 through the similarities?

1 A. Yeah, I thought this might be a good way to
2 compare apples to apples, if you will.

3 Q. I'm going to actually ask you open up page 7 from
4 your -- because I'm concerned you're looking that way
5 and the judge is that way, so maybe let's try and work
6 from --

7 A. Okay, page 7. Okay. I've got it.

8 Q. So let's start walking through. What similarity
9 is reflected by the letter A?

10 A. It's the background color for the two respective
11 packages.

12 Q. Which is white?

13 A. White in both cases.

14 Q. And what do we see -- so we have the B there that
15 seems to be at or over the "L" for "Life"?

16 A. It's the word "Life" and how it appears in both.

17 Q. So there's similarity there?

18 A. There is.

19 Q. And then C looks like it's referring to the side
20 of the box.

21 A. It's referring to whatever copy appears on the
22 side, which we can see in the prototype L-I-F-E, but we
23 can't read anything else.

24 Q. And what does D represent?

25 A. D is the endorsement by Art Linkletter.

1 Q. And E, what's the similarity that that represents?

2 A. D?

3 Q. E.

4 A. I'm sorry. E is the descriptive headline for the
5 game, which is the same in both cases except for a
6 bolder type font.

7 Q. Okay. We'll get to the differences in a moment.

8 A. Yes.

9 Q. And F?

10 A. F is the call-out to commemorate the 100th
11 anniversary game for Milton Bradley.

12 Q. So those are similarities that you found between
13 the two box covers; correct?

14 A. Correct.

15 Q. So if we go to page 8, did you identify for us
16 differences between the box covers?

17 A. I did.

18 Q. So we have four images here. We have the
19 prototype in the top left and the cover that we just
20 looked at in the top right.

21 MR. KRUMHOLZ: I will represent that the images
22 at the bottom are two other versions with a copyright
23 of 1960 that we've premarked as HTX16 and HTX18, and we
24 have the physical games. We'd like to move those into
25 evidence at this point.

1 THE COURT: Any objection?

2 MR. POLLARO: No objection.

3 THE COURT: All right. So 16 and 18, the two
4 games, will be full.

5 (Defendant's Exhibit HTX16 was admitted in full)

6 (Defendant's Exhibit HTX18 was admitted in full)

7 Q. And we seem to have a different approach here. We
8 have colors and geometric shapes to help us orient
9 ourselves, so why don't we start walking through that.

10 A. Yes.

11 Q. And as we go through each, I'll also be asking you
12 to explain to the Court what significance, if any, do
13 you place on these differences.

14 A. Right.

15 Q. So first we have the yellow oval which circles The
16 Game of Life in the four different versions. Can you
17 explain to the Court -- we can all see the difference,
18 but explain to the Court the difference and then the
19 significance of that difference to you.

20 A. It actually, Josh, just circles the three words,
21 "The Game Of."

22 Q. Oh, I apologize. Thank you. Yes, it circles just
23 "The Game Of"?

24 A. Right. So the differences are it has a minor
25 presence in the prototype package, whereas in the

1 commercial versions it's superimposed appropriately
2 over the title. The significance of this is in the
3 prototype package the title seems to be 100 Life. It
4 could cause that confusion in the eyes of the consumer.
5 You don't want confusion at all at retail if you can
6 help it. So what the Milton Bradley designers did is
7 move the three words "The Game of Life" above the
8 title, increased the weighting of the font, so that
9 when a consumer sees this package they read correctly
10 the title of the game all in one, The Game of Life.

11 Q. And how significant a decision is that from your
12 perspective as a game designer?

13 A. It's fundamental. You must make sure the first
14 thing the consumer knows is is it a game, a toy, a doll
15 or whatever, so you want to promote the word "game" in
16 strong juxtaposition to the name of the game. In this
17 case you create unity by saying "The Game of Life" in
18 the way you see it on the three production packages.

19 Q. And let's keep moving. So we then have the green
20 in the lower right hand one. It's circling nothing so
21 we see that difference, but tell us what the difference
22 is in the terms of the 100th designation and the
23 significance of that.

24 A. I'm going to call this the 100th anniversary game
25 seal. It's a call-out so that the consumer knows that

1 this game is the -- has significance. That is, in
2 fact, the 100th anniversary game published by Milton
3 Bradley, which says two things. Number one, the game
4 has a certain distinction; and number two, Milton
5 Bradley has been around for a hundred years.

6 **Q.** So what's the creative contribution in moving
7 it -- well, let's deal with both the shape and deal
8 with the change in location.

9 So let's deal with the shape first. Is there a
10 creative contribution in changing the shape from a
11 diamond to a squiggly oval, if that's the correct term?

12 **A.** And again, something that I've known since my
13 college days. A diamond is much more
14 attention-getting. A diamond with sharp corners is
15 typically more appealing to a male, and the typical
16 consumer for a family game is actually a female. It so
17 happens that an oval is equally liked by both sexes.

18 By putting the message inside of an oval and
19 making it somewhat subservient in location to the title
20 The Game of Life, it registers in the consumer's brain
21 at the appropriate time, which is after you figured out
22 the name of the game, what it is according to the
23 headline and then you've got the supportive message
24 that this game is, in fact, special.

25 **Q.** And what's the significance of the change of

1 location?

2 A. Well, when it was over top of the word "Life" it
3 created the confusion that the title was, as I say,
4 100 Life because, you know, when you're walking down
5 the shelf 20, 30 feet away, what do you see? You see
6 "100" and you see the name "Life." In the production
7 game you see "The Game of Life," and then you notice
8 appropriately that it is the 100th anniversary game.

9 Q. So let's then talk about the red rectangle here
10 where we have this band. The band is in the commercial
11 versions but not in the prototype. What's the
12 significance of that, from your perspective as a game
13 designer?

14 A. Well, the gray band, as it was known in the trade,
15 was Milton Bradley's standard corporate identity on the
16 cover of all their games during that era and for many
17 years to come. And Milton Bradley, the man himself,
18 started his business as an -- because he was an
19 educator and he actually made educational products. He
20 got into games because he favored educational games, so
21 it became traditional for Milton Bradley to carry
22 forward this educational message by including this MB
23 key design. So that appeared on every game.

24 And underneath of that we see the age rating.
25 Now, this is one of the most essential pieces of

1 information to put on the cover of a box because,
2 again, the person who is going to purchase this game
3 needs to know is it appropriate to me if I'm the
4 consumer, or is it appropriate to my children, and so
5 if so what age children would be able to play this
6 game. So that's why that's included.

7 Down below at the bottom, that information is
8 the product number, made in USA, and that's there for
9 the trade.

10 Q. So let's walk through the rest of these. You have
11 the box, the actual word "Life"?

12 A. Yes.

13 Q. Why did you do that? What's the significance?

14 A. Well, it's moved. It's now more toward the right.
15 It's not centered. I think the proportion of the
16 letters may be a little different. We also can't tell
17 in the black and white picture of the prototype what
18 the four colors are that are in the background of the
19 name "Life," but they seem in tone to be comparable.

20 Q. Okay. So we have the orange circle of the full
21 3-D action game.

22 A. Yes.

23 Q. What's the -- obviously in the last one the words
24 are changed entirely to "a family game"?

25 A. Yes.

1 Q. Is that the main difference between those?

2 A. Well, the subhead, as we call it, its intent is to
3 provide a descriptor of the nature of the game. And in
4 the prototype and in the early versions, they, Milton
5 Bradley, elected to preserve that wording as full 3-D
6 action. But by the time we got to the third version, I
7 think they were getting enough feedback from interested
8 parties to know that maybe the game really wasn't a
9 full 3-D action game and that a family game had a more
10 positive appeal to the consumer.

11 Q. All right. And let's deal with this last one
12 where we box off the endorsement for Mr. Linkletter to
13 the significance of the differences there.

14 A. Yes. The endorsement of Mr. Linkletter in the
15 prototype just shows his picture. The significance of
16 the endorsement in the production version is that he is
17 seen playing the game, which means he's connected to
18 it, which does a much better job of reinforcing his
19 message, which is I heartily endorse this game. And it
20 also includes his signature, which is another
21 reinforcement to his endorsement.

22 Q. So there are obviously a lot of similarities
23 between the prototype and the commercial version box
24 covers; correct?

25 A. Yes, there were.

1 Q. And you're not suggesting, are you, that they're
2 totally independent works?

3 A. No, I'm not.

4 Q. But you've identified some of the -- you've
5 identified the differences that you saw; correct?

6 A. Correct.

7 Q. And in your view as a game designer, are these
8 creative contributions?

9 A. Absolutely.

10 Q. And can you explain why you view them as creative
11 contributions.

12 A. Because every element of design helps to
13 contribute to a product's success or failure. Good
14 design may not seem to be that different from bad
15 design, but in my experience little things count.

16 Q. And which in your view has a better look and feel
17 to it for purposes of creating the aesthetic appearance
18 that enhances the best chance of success?

19 A. Well, the prototype box is a really nice box, but
20 the commercial qualities needed for the package at
21 retail are superior in the commercial versions.

22 Q. So do you have an opinion as to whether the
23 commercial version box covers are the same as,
24 derivative of, or independent from the prototype box
25 cover?

1 MR. POLLARO: Objection, your Honor. Calls for
2 a legal conclusion.

3 THE COURT: Overruled. I'm going to allow it.

4 A. They're derivative.

5 Q. Okay. And is that based on the difference that
6 the contribution that you've just described in terms of
7 the changes?

8 A. Yes.

9 Q. All right. So let's move over and talk, move to
10 page 8, I mean page 9 of the demonstratives, which also
11 comes from JTX509 and HTX14. And do you understand
12 that the black and white photos are again from the
13 prototype and the color is from an early commercial
14 version of The Game of Life?

15 A. I do.

16 Q. And again, are we using the same methodology here
17 of having letters help understand where the
18 similarities are?

19 A. Yes. I use letters to show comparable elements on
20 each one.

21 Q. And then we'll talk about the differences after
22 that.

23 A. Certainly.

24 Q. Let's do that. Let's talk about the similarities.
25 What does the A represent?

1 A. The A represents the circuitous track on the board
2 of the prospective games.

3 Q. What does the B represent?

4 A. The B represents the spinner found in each
5 version.

6 Q. So both have spinners and both have circuitous
7 tracks?

8 A. That's correct.

9 Q. And what about C?

10 A. C is the background graphic, the underlay, if you
11 will, of the textured countryside, I'll assume is what
12 is present in the prototype and it's certainly present
13 in the commercial version.

14 Q. What are you saying is similar there?

15 A. The use of a model patchwork quilt countryside you
16 would assume to be around a highway.

17 Q. Even though we can't actually see the colors in
18 the prototype?

19 A. No. We know something is there. We just don't
20 know the colors, so maybe I'm making a little bit of a
21 leap of faith.

22 Q. We see different shades.

23 A. I see different shadings, yeah.

24 Q. And what is the similarity that's represented by
25 the D?

1 A. D is the three-dimensional elements in the game,
2 the buildings and the mountains.

3 Q. So similarities so far are they both contain a
4 circuitous track, a spinner, they both have a kind of
5 patchwork background, and they both have
6 three-dimensional elements?

7 A. They do.

8 Q. And what is E?

9 A. E is the actual gameplay instructions that appear
10 on every space of the commercial version and that
11 appear to be present on every space in the prototype.

12 Q. And so for the commercial version, we can see the
13 actual words?

14 A. Yes.

15 Q. We have the game itself. Are you able to see the
16 words that are on the prototype's path?

17 A. No, and I've tried using every technique that I
18 have in my graphic program to resolve them, but I
19 can't.

20 Q. So at least from your perspective there's no way
21 of knowing whether Milton Bradley actually used any of
22 the words from the path of the prototype?

23 A. No, we can't be conclusive.

24 Q. Well, I mean, do we have any idea?

25 A. We know there's words there. And when we get to

1 the rules we can infer a few things, but we just can't
2 know for sure.

3 Q. Okay. What does F represent?

4 A. F is the separate component called the number
5 board.

6 Q. And both have a number board?

7 A. They both have a number board. They both have the
8 numbers 1 through 10 on them.

9 Q. So let's move to page 10. We don't have any --
10 nothing edited here. It was too hard to try to lay
11 that out --

12 A. Yeah.

13 Q. -- clearly.

14 So let's walk through what differences you see
15 with regard to the board. And let me ask you before
16 that, we talked about the importance of the box cover
17 and the aesthetics of the box cover. Are the
18 aesthetics of a game board generally, are they
19 important?

20 A. They certainly are. Yes, they certainly are.

21 Q. And in what way are they important?

22 A. They need to clearly communicate the actual play
23 elements inherent on a board, and they also need to
24 enhance the theme with the choice of background
25 graphics and any non-gameplay elements that are

1 included to reinforce the theme.

2 Q. And is the look and feel of the game board
3 important?

4 A. Sure, because you want to make it look exciting
5 and interesting to first-time players in particular.

6 Q. And how important is it for a game company to get
7 the look and feel of a game board right in selling a
8 successful commercial product?

9 MR. POLLARO: Objection, your Honor. We're
10 getting outside the scope of his report. There's no
11 look and feel disclosed in his report.

12 MR. KRUMHOLZ: There's aesthetics, paragraph
13 172.

14 THE COURT: Overruled. I'll allow it. Go
15 ahead.

16 A. That's why companies employ talented designers is
17 because their skills and their experiences contribute
18 to refining an initial prototype into a design that has
19 just those qualities, just the right balance of
20 gameplay and the right balance of image or
21 game-enhancing graphics and components. So it's
22 essential to the success of the product.

23 Q. Let's talk particularly about paths in the game
24 boards. Are there particular -- generally speaking,
25 are there particular kinds of paths that are used?

1 **A.** Yes. Game boards typically are based on one of
2 three path models. You have a grid board, which you
3 can use chess as an example. The Checkered Game of
4 Life had a grid even though you actually moved on it
5 circuitously.

6 A game like Monopoly is emblematic of what's
7 known as a continuous path board. The advantage of a
8 continuous path is you go around the board as many
9 times as required until the victory conditions are met,
10 which means that the number of spaces on the path are
11 somewhat irrelevant because you're going to cover X
12 number of spaces when a condition is reached.

13 A circuitous path is a very common type of game
14 board in the 18th -- 19th century, especially early in
15 the 20th century because back then players tended to
16 like a beginning and an end space, which is what a
17 continuous path is.

18 If you look at a game like Milton Bradley's
19 Uncle Wiggily from the 1920s, there's a long line of
20 continuous paths game.

21 The Game of Life utilizes a continuous path
22 game.

23 **Q.** What kinds of considerations go into developing a
24 continuous path like we see in The Game of Life?

25 **A.** Well, the biggest consideration is consumers

1 expect the game to take a particular length of time to
2 play; and unlike a continuous path game where the
3 number of spaces don't really matter, in a continuous
4 path game you need to have enough spaces to go from
5 start to finish in approximately in this era 45 to
6 60 minutes.

7 Q. Okay. And what kind of, like, spacial constraints
8 are there that a designer would have to deal with?

9 A. Well, certainly you're going to have to wind the
10 path -- if you need to achieve that playing length,
11 you're going to need to wind your path to have enough
12 spaces within the geometry of this game board to go
13 from start to finish in the desired period of time.

14 Q. When we talk about the differences, let's start
15 with the path itself. You've identified -- there's
16 obviously similarity here, to be sure, between the two
17 paths, but have you identified differences that you
18 find to be meaningful?

19 A. I think that the number of spaces on both paths is
20 slightly different but it's not significant.

21 The major difference, of course, which we can
22 pretty much see in the prototype version is the number
23 of spaces in the prototype are elevated, whereas in the
24 production game they're all printed on the game board
25 label, with the exception of four -- pardon me, three

1 -- no, four areas that are slightly raised in
2 dimensional plastic components.

3 Q. Let me ask you about that. From an aesthetic or a
4 look and feel perspective, what's the significance of
5 having the path printed on the board versus having it
6 raised on the board?

7 A. Well, there's two important considerations, one of
8 which Mr. Carty actually hit upon this morning, which
9 is that the more elevated spaces you have on the board,
10 the greater your chances of breakage.

11 In addition, it's very, very challenging to make
12 this on an assembly line. So I think the first
13 consideration that the designers inside of Milton
14 Bradley had was to, yes, bring the cost down by
15 printing it; but, secondly, to eliminate the danger of
16 the game actually breaking during use.

17 Q. Okay. And does it create a different look, or is
18 it a similar look from your perspective?

19 A. Well, when you take away the three-dimensional
20 highway look, you have a different look. You have a
21 different expression.

22 Q. All right. So let's talk about what other
23 differences, if any, you saw with regard to the path.

24 A. Sure. In the prototype, the mountains are
25 background scenery, whereas in the production they

1 integrated the mountains into the ramps, as I call
2 them, that are part of the path. And I think the
3 significance here is that if you're playing this game,
4 especially if you are a child you actually have the
5 satisfaction of going through a mountain road.

6 Q. So Mr. Carty suggested that these kinds of changes
7 were just for cost purposes. But do you agree with
8 that with regard to, you know, building the mountains
9 into the path itself?

10 A. No. I think that this is a very fine aesthetic
11 expression that is very nicely linked in the gameplay.
12 I admire this design.

13 Q. Let me also ask you about something we talked
14 about with Mr. Carty, which is this white bridge there
15 with the river underneath it. Do you see what I'm
16 looking at?

17 A. Yes.

18 Q. What's the significance of that from an aesthetic
19 standpoint, from a look and feel standpoint in your
20 opinion?

21 A. Well, first the toll bridge is known as a very
22 significant event when it's crossed in the game. It's
23 very important that you know which player gets across
24 that bridge first because he becomes the toll keeper
25 and he earns special privileges. By making it look

1 like a bridge and making it in a contrasting color,
2 white, it's very attention-getting, which it needs to
3 be. And when you cross over it, the first player who
4 crosses over it, it's very easy to tell they made it
5 across the bridge. By adding the river below, it
6 reinforces the notion that this is indeed a bridge.

7 Q. So I mean your answer is often talking about both
8 aesthetic and functional play.

9 A. Yes.

10 Q. Is that a common thing that different factors are
11 coming into decisions like this?

12 A. Yeah, it goes hand-and-glove, and it's a desired
13 outcome on the part of designers. They want to bring
14 aesthetic considerations into, to bear on what
15 otherwise might just be simply functional elements. A
16 functional element is something that really doesn't
17 matter how it's styled. It's there. It serves a
18 purpose. It doesn't draw attention to itself, but when
19 you marry function with aesthetics you have
20 serendipity.

21 Q. Just one more thing on the path. It's a little
22 hard to tell on this, but do you see those arrows
23 between the box?

24 A. It's very easy to tell that the graphic on the
25 path of the prototype has straight lines that separate

1 each space. What the Milton Bradley designers did,
2 which is very helpful to game players, is they styled
3 the dividers between each space as forward-pointing
4 arrows, and that means as you're traveling on the path
5 especially when you come to intersections there's no
6 confusion; you know which way to go next.

7 Q. Let's now talk about the three-dimensional objects
8 on the board. Was that a significant addition from
9 your perspective, from a look and feel perspective?
10 You know, just kind of conceptually using
11 three-dimensional objects.

12 A. Well, first, I believe all the three-dimensional
13 objects in the prototype were placed on the board. In
14 the production game --

15 Q. Hold on. I want to back up a second. I just want
16 to understand whether you think that it was a
17 significant addition having three-dimensional
18 components. Was that a factor in the success of the
19 game?

20 A. You mean in the prototype?

21 Q. No, no. Just generally in the game having
22 three-dimensional --

23 A. Yeah, very enhancing of the idea you're traveling
24 on a live highway through a countryside, yeah.

25 Q. And the prototype had three-dimensional components

1 in the form of buildings, towers and mountains;
2 correct?

3 A. Yes, it did.

4 Q. And did Milton Bradley deal with the expression of
5 the three-dimensional objects differently?

6 A. Well, it did. First, as I mentioned, it
7 integrated the mountains into the gameplay, which is
8 very aesthetically pleasing. Secondly, it selected a
9 subset of the buildings that were present in the
10 prototype and positioned them so that they actually tie
11 into the events that are taking place on the game path.

12 Q. For example?

13 A. Well, you have a college where college takes
14 place. You have an office building where the path
15 depicts business events. There's a house where you're
16 getting married, you know.

17 Q. So are there less buildings?

18 A. Yes, there seem to be less buildings, several less
19 buildings.

20 Q. Mr. Carty suggested that that is for cost reasons.
21 Obviously, one would assume it's cheaper to have less
22 buildings, but are there other reasons that you would
23 have less buildings?

24 A. Well, Mr. Carty is right, there's certainly a cost
25 consideration here, but if you have too many

1 non-gameplay-related elements, it adds to confusion and
2 distraction, and a lot of consumers will say, well,
3 they must have some association with gameplay, why are
4 they here? And then when you find out that they don't,
5 it's not only confusing but it's disappointing.

6 So what I admire about the selection of the
7 buildings here is that they are thematically related to
8 the position on the path where they're located.

9 Q. Did you hear Ms. Ross this morning say that she
10 believed that the 3-D elements in the prototype were
11 larger than in the commercial version?

12 A. Yes, I heard her say that.

13 Q. Is making them smaller just a function of cost, or
14 is there a creative element to that?

15 A. Cost is certainly a factor. You need this -- one
16 of the things that I'm baffled by in the prototype is I
17 can't figure out how it folded; and when you fold a
18 game board, you need to make sure that it fits in a
19 fairly traditional depth of package because if you have
20 a box that's too deep the retailer can't put as many on
21 the shelves.

22 So by having a more economical height to all of
23 these components, you preserve a reasonable package
24 depth. But in addition, the scale of the components is
25 more commensurate with the gameplay. In other words,

1 the buildings are too big, the mountains are too big,
2 they overwhelm, and aesthetically they cause confusion.

3 Q. Fair to say we can't compare the color because we
4 have a black and white?

5 A. Correct.

6 Q. Although you heard Ms. Ross indicate that, at
7 least in her deposition, she thought the colors were
8 different?

9 A. Yes.

10 Q. And as we talked about, we can't compare the
11 copy --

12 A. By the way, if the colors were indeed more
13 colorful in the prototype, I think one reason why the
14 Milton Bradley designers muted them is because you
15 don't want them jumping out. You want the path to jump
16 out.

17 Q. All right. So what are your thoughts about how
18 Milton Bradley did in creating the color of the path
19 versus the color of the background?

20 A. Well, black is the color of a highway so it makes
21 sense to use black. I'm pretty sure the prototype used
22 black, too, and to contrast the copy in most cases you
23 want to use white copies so that stood out, but a
24 countryside that the path goes through is typically
25 shades of green and earth tones, you know, maybe

1 occasionally something in the yellow family if it's a
2 field.

3 Q. So Mr. Carty indicated his belief that all these
4 changes we've just talked about were kind of rogue
5 changes that didn't require creative contribution. Do
6 you agree with that?

7 A. In my experience, no, I do not.

8 Q. Can you explain why you don't or in what way you
9 don't agree with that.

10 A. Because every alteration that takes place
11 especially in the preliminary design portion of a
12 project inside a company is first and foremost intended
13 to perfect gameplay and to perfect the look of the
14 components to reinforce and not confuse gameplay.

15 Q. So which board in your view has a better look and
16 feel to it from the perspective of creating a
17 commercially successful game?

18 A. I think I would answer that by saying the
19 commercial version is just that. It's commercially
20 advantageous for all the reasons we've just talked
21 about.

22 THE COURT: Let's go off the record for a
23 moment.

24 (Discussion off the record)

25 THE COURT: Back on the record.

1 Q. So do you have an opinion whether the --
2 obviously, there are a lot of similarities. You're not
3 suggesting that it's an independent work.

4 A. No.

5 Q. Do you have an opinion as to whether the
6 commercial version game board from 1960 is the same or
7 derivative of the prototype board?

8 A. It's derivative.

9 Q. And did you also look at the other -- so in total
10 there were I think five boards that have 1960 copyright
11 date; is that right?

12 A. Yes.

13 Q. And did you look at all of them?

14 A. I did.

15 Q. And are all these differences that you explained
16 in those other versions as well?

17 A. Yes, plus a few additional differences.

18 Q. Okay. And we have a couple of those to admit, but
19 we can do that tomorrow morning or after we're done.

20 MR. KRUMHOLZ: Now is a logical time, your
21 Honor.

22 THE COURT: Okay. Very good. We'll break for
23 the day. We'll be off the record.

24 (Discussion off the record)

25 (Adjourned)

C E R T I F I C A T I O N

I, Denise P. Veitch, RPR, do hereby certify
that the foregoing pages are a true and accurate
transcription of my stenographic notes in the
above-entitled case.

/s/ Denise P. Veitch
Denise P. Veitch, RPR

March 13, 2018
Date